

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICK HATELY,

Plaintiff,

VS.

NICOLE TORRENZANO,

Defendant.

16-cv-1143

June 6, 2017

TRIAL

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: LEXERO LAW
BY: ERIC MENHART, ESQ.
ROBINSON LAW SERVICES
BY: WILLIAM P. ROBINSON, III

FOR THE DEFENDANT: GREENBERG COSTLE PC
BY: CARY S. GREENBERG, ESQ.
TIMOTHY R. BRADLEY, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
U.S. District Court
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2 (Thereupon, the following was heard in open
3 court at 10:02 a.m.)

4 THE CLERK: Civil action 16-1143, Patrick
5 Hatelly versus Nicole Torrenzano.

6 Counsel, please note your appearances for
7 the record.

8 MR. GREENBERG: Your Honor, Cary Greenberg
9 and Tim Bradley on behalf of Nicole Torrenzano who is
10 present as well as our counsel.

11 THE COURT: Good morning.

12 MR. BRADLEY: Good morning, Your Honor.
13 Timothy Bradley on behalf of Ms. Torrenzano.

14 THE COURT: Good morning.

15 MR. GREENBERG: Good morning, Your Honor.
16 Eric Menhart on behalf of the plaintiff, Patrick Hatelly.

17 THE COURT: Good morning.

18 MR. ROBINSON: Good morning, Your Honor.
19 William Robinson on behalf of Mr. Patrick Hatelly.

20 THE COURT: Good morning.

21 MS. EGAN: Good morning, Your Honor, Colleen
22 Egan on behalf of the plaintiff, Patrick Hatelly.

23 THE COURT: Good morning.

24 Good morning, Mr. Hatelly.

25 MR. HATELY: Good morning.

1 MR. GREENBERG: Your Honor, one brief matter
2 I might bring to your attention.

3 THE COURT: Yes.

4 MR. GREENBERG: Your Honor, yesterday you
5 overruled several of any objections with regard to
6 hearsay with regard to an exhibit that Mr. Hatley had
7 manufactured on his own. I know you allowed it to be
8 published to the jury, and subsequently, the second
9 exhibit as well.

10 THE COURT: Which document are you talking
11 about?

12 MR. GREENBERG: I believe it was 10 and 11,
13 but --

14 THE COURT: The chart?

15 MR. GREENBERG: Yes.

16 THE COURT: Okay.

17 MR. GREENBERG: Yes, the chart. And Your
18 Honor, I realize that after -- although I objected on
19 the hearsay grounds repeatedly and I know the Court
20 denied that, I'm asking the Court to revisit one part of
21 that ruling, if it would, which is the fact that
22 Mr. Hatley had the right, I believe, given the Court's
23 ruling to testify that there was an IP address, whatever
24 that address was that he saw in his account. I think he
25 further identified that that wasn't his idea -- his IP

1 address.

2 But I don't understand -- there is no basis,
3 and I don't even know if he's correct about it, so we
4 can't even cross-examine it, whether or not the IP
5 address that he then decided was Ms. Torrenzano's to her
6 iPhone or to Dr. Watts', or some computer he had. And
7 then he gave another IP address that he said was to
8 another location, there is no way that -- I don't even
9 know if that's true, but we can't --

10 THE COURT: I told you I would let you
11 cross-examine him about those questions.

12 MR. GREENBERG: Well, I realize that, but
13 all he can just do is say that was his independent
14 research. It still gets in front of the jury and I'm
15 left to, what I think is speculation on his behalf. And
16 I don't have a witness that actually said that's true
17 and accurate.

18 So my question to the Court is to revisit
19 just that piece and direct the jury that that part of it
20 where he said he knows what the IP address is for
21 someone else without any foundation not being
22 considered.

23 THE COURT: I will let you cross-examine.

24 MR. GREENBERG: Yes, sir. Thank you for
25 considering it, Judge.

1 THE COURT: You can bring our jury out.

2 MR. HENDRICK: Yes, sir.

3 THE COURT: Just a second, Mr. Hendrick.

4 The chart that you're referring to that was derived from
5 Google records that was prepared by Mr. Hatelly was
6 admitted as non-hearsay because it reflects a record of
7 his computer service. And the chart that he drew is
8 admissible under Federal Rule of Evidence 1006.

9 Thank you.

10 (Jury present at 10:06 a.m.)

11 THE COURT: You may be seated.

12 Mr. Hendrick, if you would close the blinds,
13 please.

14 MR. HENDRICK: Yes, sir.

15 THE COURT: Thank you.

16 Good morning, ladies and gentlemen.

17 THE JURORS: Good morning.

18 THE COURT: Good morning, Mr. Hatelly.

19 Good morning, Ms. Torrenzano.

20 MS. TORRENZANO: Good morning.

21 THE COURT: Counsel, ready to proceed?

22 MR. MENHART: Yes, sir.

23 MR. GREENBERG: Yes, sir.

24 THE COURT: All right.

25 MR. MENHART: Your Honor, we're going to

1 have Patrick Hatelly take the stand again.

2 THE COURT: All right.

3 DIRECT EXAMINATION

4 BY MR. MENHART:

5 Q. Good morning, Mr. Hatelly.

6 A. Good morning, Mr. Menhart.

7 Q. I'm now showing to you Exhibit No. 13.

8 A. Okay.

9 Q. Do you recognize this exhibit?

10 A. Yes, I do.

11 Q. Please explain what this exhibit is.

12 A. This is a screen shot from my computer that shows
13 what my IP address is when I looked it up at the same
14 time --

15 MR. GREENBERG: I object to this as hearsay.
16 What this is is an example -- I understand he did the
17 Google research and what he trying to do is admit the
18 results of that research.

19 THE COURT: And your objection is what?

20 MR. GREENBERG: That everything he found,
21 the search terms is hearsay. This is just what he
22 decided was the results. We have no independent way of
23 knowing if this is true and accurate. It has to be
24 considered by the jury as true and accurate.

25 THE COURT: All right.

1 MR. MENHART: Your Honor, our response to
2 that is that Mr. Hatelly testified that he created this
3 document. It's clear from the face of the document what
4 is being displayed. And to the extent that there was
5 any type of technical objection to this, the defendant
6 certainly had an opportunity to present an expert
7 witness, but none has been designated.

8 THE COURT: Are you offering expert
9 testimony or are you offering factual evidence?

10 MR. MENHART: We're not offering expert
11 testimony.

12 THE COURT: All right.

13 MR. MENHART: But neither are they.

14 MR. GREENBERG: Your Honor, this is -- as I
15 said, Your Honor, this is -- this is just -- this is
16 complete hearsay for him to go on to Google, download
17 the things he would like to have and put it in front of
18 the jury. And we object to this for all sorts of --

19 THE COURT: So you're not challenging the
20 authenticity of it. You're just challenging the fact
21 that he did it?

22 MR. GREENBERG: I'm also challenging the
23 authenticity, because I don't know if he modified this.
24 What -- when we --

25 THE COURT: All right. I'll tell you what,

1 as I said earlier, I'll let you cross-examine.

2 Objection overruled. Go ahead.

3 MR. MENHART: Thank you, Your Honor.

4 Your Honor, we would like to formally have
5 this Exhibit No. 13 admitted into evidence.

6 THE COURT: All right. Give me a little bit
7 of background when he did this and what it reflects.

8 BY MR. MENHART:

9 Q. Mr. Hatelly, please tell me a little bit about
10 when this was created and explain to me what the
11 information represents in your personal point of view?

12 A. Sure. So, the -- it's kind of divided in half.
13 The left-hand side is the same screen shot of the
14 security -- the recently used devices. So it's the same
15 screen shot showing Ms. Torrenzano's iPhone, the same IP
16 address that's in the previous activity logs.

17 And then on the right-hand side, you know, it
18 shows what my public IP address is, which also matches
19 what the Google account activity information has at the
20 bottom of it which we'd -- which we talked about before.

21 So, it's kind of showing the comparison between
22 what mine is and then the iPhone that changed the
23 password.

24 Q. Thank you, again.

25 MR. MENHART: Your Honor, again we would

1 offer Exhibit 13 into evidence.

2 THE COURT: Received over objection.

3 MR. MENHART: Okay, we'd like to now display
4 this to the jury.

5 THE COURT: All right.

6 MR. MENHART: And we'd get that pulled up
7 for the jury right now. All right.

8 BY MR. MENHART:

9 Q. So, Mr. Hatelly, again now the jury can see the
10 document. Please explain and point out the specific
11 portions you were just discussing a moment ago.

12 A. Sure. So, this is the same 108 IP address that
13 was in my Google account activity information. At the
14 bottom where it says this is what your IP address is.

15 And then this is also -- it's the screen shot of
16 Ms. Torrenzano's iPhone that if you scroll down just a
17 little bit, also shows the IP address here, the
18 16617031201, so it matches exactly what's in my Google
19 account information for the IP addresses that's in there
20 connected to my e-mail.

21 Q. What do the differences between the IP addresses
22 mean to you?

23 A. The difference here is that one is -- what
24 belongs to me when I'm at home on my laptop which is
25 where I took this. And I -- it wouldn't have -- I mean,

1 I wouldn't have this 166171 if I had the 108.44 because
2 you can't have two IP addresses.

3 MR. GREENBERG: Your Honor, I object to
4 that. I don't know if he can have two or not.

5 THE COURT: Sustained.

6 BY MR. MENHART:

7 Q. Mr. Hatelly, how -- why did you just testify that
8 one device can't have two IP addresses?

9 MR. GREENBERG: Your Honor, I object. It
10 was sustained.

11 THE COURT: Sustained.

12 BY MR. MENHART:

13 Q. Referring to Exhibit 14, please --

14 A. Okay.

15 Q. -- do you recognize this document, Mr. Hatelly?

16 A. I do. Yes, this is a screen shot from my
17 cellphone, from my Samsung phone, the android one that
18 shows on -- this is the e-mail I got from when Ms.
19 Torrenzano went into my account in November and reset
20 the password for it.

21 MR. GREENBERG: Your Honor, I object to him
22 adding additional "went into the account". He is
23 describing nothing about Nicole Torrenzano. So, if he's
24 describing this document --

25 THE COURT: Did Ms. Torrenzano testify that

1 she reset his password, Mr. Greenberg? Did she testify
2 to that earlier?

3 MR. GREENBERG: She did say on one date.

4 THE COURT: Okay, thank you. Thank you very
5 much. I thought that's what she said.

6 Next question.

7 MR. MENHART: Your Honor, would --

8 BY MR. MENHART:

9 Q. What was the date -- strike that. Did you
10 personally take this screen shot?

11 A. I did. Right on the phone.

12 Q. What was the date of the screen shot?

13 A. November 3rd.

14 MR. MENHART: Your Honor, we would ask that
15 Exhibit Number 14 be admitted into evidence.

16 THE COURT: Received.

17 BY MR. MENHART:

18 Q. Please refer to Exhibit No. 15. Do you recognize
19 this document, Mr. Hatelly?

20 A. Yes, I do.

21 Q. Can you please tell me what this represents.

22 A. This is a history of connections into my Facebook
23 account. It shows the date, the time, the IP address,
24 what kind of browser, details like that, this is the
25 security information page.

1 Q. And --

2 MR. GREENBERG: Your Honor, so, okay, Your
3 Honor, again, I don't know what this means. So, there's
4 nothing --

5 THE COURT: I'm going to give you a chance
6 to cross-examine.

7 MR. GREENBERG: But, Your Honor --

8 THE COURT: Let me finish. Let me finish.

9 MR. GREENBERG: Sure.

10 THE COURT: I understand your objection.
11 This is a machine-produced document, and you are
12 entitled to cross-examine him about it. If you are able
13 to establish that it's reliable, that's fine.

14 I don't know how you would authenticate
15 something from a computer in any event, other than to
16 type in the machine, here is what the machine produced.
17 You can certainly cross-examine him about that.

18 MR. GREENBERG: Your Honor, but if I could
19 comment on that. I agree with you that I understand
20 that this is a machine produced. But, what the
21 information, whether this is what Facebook provides,
22 what it means, whether that can be altered or him
23 explaining what Facebook does or why, he doesn't have
24 any firsthand knowledge of that.

25 The jury can look at this. But -- the fact

1 that it's a spit out of a machine doesn't mean we know
2 what the parameters were, why it was being provided, why
3 Facebook --

4 THE COURT: You can certainly ask him all
5 those questions, Mr. Greenberg.

6 MR. GREENBERG: Yes, sir.

7 MR. MENHART: Your Honor, we would ask that
8 Exhibit No. 15 be entered into evidence.

9 THE COURT: Well, tell me about their
10 admissibility, Mr. Menhart.

11 MR. MENHART: Excuse me.

12 THE COURT: What is your theory of
13 admissibility for this document?

14 MR. MENHART: The theory of admissibility is
15 that Mr. Hatelly went into his own personal Facebook
16 account. He utilized a service provided by Facebook,
17 which is in the designated security tab on the left-hand
18 side of the document. And Mr. Hatelly will testify as to
19 what some of the security logs mean to him.

20 THE COURT: Come to sidebar, please.

21 (Thereupon, the following side-bar
22 conference was had.)

23 THE COURT: Mr. Menhart, is this from
24 Facebook?

25 MR. MENHART: Yes, sir.

1 THE COURT: Is this case now about Facebook,
2 or is it about e-mail?

3 MR. MENHART: Well, Facebook is, by the
4 definition of Stored Communication Act, it is an
5 electronic communications service provider.

6 Now, whether it is or not, even if we set
7 that aside, what it does demonstrate that -- it does
8 demonstrate and he'll testify to this that there are
9 specific instances in his Facebook security log that are
10 consistent with other instances of the unauthorized
11 accesses of his e-mail accounts. So, we believe it's
12 relevant on both of those grounds.

13 THE COURT: All right. And, how will he
14 show that they were unauthorized access on this
15 document?

16 MR. MENHART: Sure, no problem. And it's a
17 somewhat voluminous document, but by the time you scroll
18 down quite a bit, and we will do that, you'll be able to
19 see specific logs that were provided by Facebook which
20 demonstrate some of the IP addresses and how the
21 password was reset on that account at the same time that
22 he previously testified the password had been reset on
23 the e-mail accounts.

24 THE COURT: All right. And, are the IP
25 addresses similar to those shown earlier?

1 MR. MENHART: Yes.

2 THE COURT: Okay. Your objection?

3 MR. GREENBERG: Your Honor, first of all,
4 I'm not sure that they're the same IP addresses.

5 Secondly, I would point out this goes
6 through a date that's -- into May of 2016, well outside
7 the realm of what we're -- what was litigated today.

8 I don't agree that the Facebook account is a
9 facility of a stored communication and that that wasn't
10 part of -- in the summary judgment motion as we narrowed
11 the issues between the parties.

12 We've talked about an e-mail account and her
13 AT&T. I know that she admitted to that. She did not
14 admit to Facebook. In fact, she specifically denied it.

15 There was no information to establish a
16 Facebook. And then to explain what this means, I think
17 we need someone from Facebook. I don't know what the
18 expert would say. Let me tell you what this means?
19 This means this is what happened from Facebook? Where
20 is --

21 THE COURT: Right here, it says "password
22 change". I mean, you don't need an expert to read that
23 "password change" on that document. And your question
24 is whether the IP address matches any device held by
25 Ms. Torrenzano or Dr. Watts?

1 MR. GREENBERG: That's one of the issues,
2 and for him to explain what all that means.

3 THE COURT: All right.

4 MR. GREENBERG: I think --

5 MR. MENHART: Our response is they can
6 cross-examine this.

7 THE COURT: Well, do we need to have all
8 these other things? You only referred to 2 or 3 items.

9 MR. MENHART: Well, we wanted to -- we
10 wanted to produce the entire document. So, you know,
11 and that's the reason we've done this. But we're not
12 going to go through every single log. I can represent
13 that to you right now.

14 THE COURT: Well, why don't we do this. Why
15 don't you go directly to the ones you want to focus on.

16 MR. MENHART: Okay.

17 THE COURT: I'm going to admit the document.
18 I think this is a machine-generated document. It has
19 conditional reliability, and I'll admit it under the --
20 not exactly a business record, is it?

21 MR. MENHART: Well, we would disagree with
22 that, Your Honor, because they are records that were
23 created by a Facebook computer as a regular course of
24 business. And you can see each and every instance --

25 MR. GREENBERG: How do you know that?

1 MR. MENHART: Well, I'll tell you --

2 THE COURT: Only one person can talk at a
3 time, and address your comments to me.

4 MR. MENHART: And you can see that each and
5 every one of these records is being created on the date
6 and time that the event is happening on the machine.

7 THE COURT: All right. I'll admit it as a
8 machine-generated, computer-generated report and allow
9 defendant to cross-examine, and your objections are
10 preserved.

11 Thank you.

12 MR. MENHART: Thank you.

13 MR. GREENBERG: Your Honor, is he going to
14 be limited to these three pages or --

15 THE COURT: I've asked him to focus on those
16 pages, but he's going to offer the whole thing. And if
17 you -- because he wants the jury to see that. This is
18 not just 2 or 3 pages. It's the whole thing. All
19 right.

20 MR. MENHART: I'll represent right now we're
21 only going to talk about these specific instances.

22 THE COURT: That's what I want you to do.
23 Okay.

24 (THEREUPON, side-bar conference was
25 concluded.)

1 THE COURT: You may proceed.

2 MR. MENHART: Your Honor, we would ask that
3 Exhibit No. 15 be admitted into evidence.

4 THE COURT: I just admitted it at sidebar.
5 It's admitted in evidence.

6 MR. MENHART: Thank you.

7 BY MR. MENHART:

8 Q. Mr. Hatelly, for purposes of this document, we're
9 going to first display it to the jury, just the top
10 page. And then I want to keep that top page shown just
11 to sort of -- for you to talk about it and then we're
12 going to go to a specific page, okay. So, we'll go
13 ahead and display the top page, please.

14 Okay. So, the jury's now seeing this. Explain
15 what this document is.

16 A. This is the security of my Facebook account. So
17 it shows like all of the devices and the sessions that
18 were created and connected to my account. It shows the
19 IP address for each one. It shows the date that it was
20 created on each one. And then it will show you, also --
21 if I can get this thing -- what kind of device was
22 there. So, there's my Samsung right there and here it
23 is again.

24 Q. Okay, thank you. Now what we're going to do is
25 we're going to keep that, just that one page displayed

1 for now.

2 A. Okay.

3 Q. But I'd like you to look at the printed version
4 of the document. And, I want to scroll to -- what's
5 been bates numbered at 2170, I believe. I realize the
6 pass -- the bates numbers are a little bit out of whack
7 here, but there is a specific page that has a log in at
8 the bottom and password change from -- second from the
9 bottom.

10 A. Uh-huh.

11 Q. Do you see that one?

12 A. I do see it, yes.

13 Q. Okay. So, what we're going to do is we're going
14 to take this page off of the display, and then we're
15 going to scroll to that page.

16 A. Okay.

17 Q. And then, we're going to display that page.

18 A. Okay.

19 Q. Okay, Mr. Hatelly, we're going to put this up for
20 the jury. Now that it's up, let's work from the bottom
21 of the page --

22 A. Sure.

23 Q. -- up as you explained to the jury what this
24 document is demonstrating.

25 A. So, it's got the same information, just kind of

1 broken into different events. So, here's a log-in, and
2 then here is where, um, Ms. Torrenzano had reset the
3 password.

4 MR. GREENBERG: Your Honor, I object to
5 that. That's not what this document says. It --

6 THE COURT: Its says password change. It
7 doesn't say Ms. Torrenzano changed the password.

8 THE WITNESS: I understand, Your Honor.

9 THE COURT: Objection sustained.

10 BY MR. MENHART:

11 Q. So, you were saying it says password change?

12 A. So it says password changed and then it shows the
13 IP address and then, again, an iPhone right there. Here
14 is where it was enrolled into the account. So it
15 connected to the account, same iPhone, same IP address,
16 all the way up here and here -- and I keep messing that
17 up.

18 So, the same IP address here, here, here. And
19 then you can see where essentially, since I didn't have
20 the right password any more on my phone, I was kicked
21 out but my phone tried to get back in. You can see
22 where it starts to try right here, the IP address and
23 the time. So 12:35 in the morning.

24 But, because I didn't have the right password
25 because I didn't -- because it was changed, I didn't

1 have it on my phone any more. It kept kicking me out.
2 It kept denying me.

3 MR. GREENBERG: Your Honor, again, is this
4 something the document shows "kicked out", or is he
5 describing more as part of the embellishment?

6 THE COURT: What's your objection?

7 MR. GREENBERG: It's not part of the
8 document.

9 THE COURT: All right, sustained.

10 BY MR. MENHART:

11 Q. Mr. Hatelly, was -- was your phone able to access
12 your Facebook account on or around November 3rd at
13 12:35?

14 A. No.

15 MR. GREENBERG: Your Honor, I -- is he
16 basing that based on the documents?

17 MR. MENHART: It was --

18 THE COURT: I thought he just testified to
19 it.

20 MR. MENHART: It was an independent
21 question. It was not referring to the document at all.

22 THE COURT: Objection overruled.

23 BY MR. MENHART:

24 Q. As you scroll up from the document effectively --

25 A. Uh-huh.

1 Q. -- strike that.

2 Please refer now to Exhibit No. 16. Do you
3 recognize this document, Mr. Hatelly?

4 A. Yes, I do. These are --

5 THE COURT: Just a second. What is it?

6 THE WITNESS: These are sticky notes with --

7 THE COURT: These are your sticky notes?

8 THE WITNESS: These are my sticky notes.

9 That's my handwriting.

10 THE COURT: All right.

11 THE WITNESS: And this is kind of -- I use
12 these for reference when I was kind of also building
13 that white board. So it's got the same in timestamps,
14 but it's more of like who was doing what.

15 And then, it kind of -- it also has like,
16 you know, the iPhone IP address, my Windows IP address,
17 or my laptop IP address, my mobile IP addresses which
18 are for my cellphone, and then kind of also when these
19 first accessed -- when like the Mac first accessed the
20 account.

21 MR. MENHART: Your Honor, we would move
22 Exhibit 16 into evidence.

23 MR. GREENBERG: Your Honor --

24 THE COURT: I'm going to withhold on this
25 one. I sustain the objection to this one. Next

1 question.

2 I'm withholding because this is just a
3 summary of something that he wrote. And, this is just
4 his summary of what he wrote.

5 Next question.

6 BY MR. MENHART:

7 Q. When did you -- when did you create this
8 document?

9 A. After I had gotten all of the information from
10 the Google account, security information, the IP address
11 logs which we talked about earlier, that's when I came
12 back and kind of wrote this. This is like a kind of
13 high level view of the detail that I got from those
14 documents.

15 Q. Please refer to document number 17, Plaintiff's
16 Exhibit 17.

17 A. Uh-huh.

18 Q. Can you please identify this document?

19 A. The front first page here, or the entire thing?

20 Q. Yes, well, start with the first page, please.

21 A. Sure. So, this is another screen -- account
22 information download that I got from my e-mail account.
23 It shows the same thing, the access type, you know,
24 whether it was a mobile device or whether it was a
25 computer and then the IP address, and then the timestamp

1 on the right-hand side on the column. And again it
2 shows like the 108.44 IP address which it says this
3 computer is using address IP 108.44 which is mine.

4 Q. What about the second page?

5 A. So, this is the -- this is the time after it.
6 So, I took two -- because you can only see like the last
7 ten account -- account activity timestamp.

8 So, I waited a little bit and I took another
9 screen shot of the next ten. And this goes actually
10 from 11:30 a.m. on the 13th, to 11 -- excuse me, 3:54 on
11 the 13th.

12 And this has the same thing. It's the account --
13 account activity page. It's got the access type,
14 whether it was a browser or a computer or a mobile
15 device. Then it has the IP addresses listed and mine is
16 in there now because I'm starting to get back into these
17 accounts and then the date and timestamp on the right.

18 Q. Tell me about the third page.

19 A. Sure. This is a lookup for the IP addresses that
20 were listed. That's the screen shot of what -- print
21 off of what you would get when you go search for on the
22 Internet what the IP address is or whatever IP address
23 you put in there.

24 Q. Is this a screen shot you created? Let me strike
25 that question.

1 Which website did you go to?

2 A. When I used mine, I went to infosniper.net.

3 Q. And, once you went there, what did you do?

4 A. There is a search bar where you can put in the IP
5 address and I put in the numbers and clicked search.
6 And it gave me like a geo-location of that IP address.
7 It also showed me the provider. It also showed me kind
8 of who it belongs to.

9 So, it gives you a little more detail, latitude,
10 longitude, and that kind of stuff, but --

11 THE COURT: Where does it say who it belongs
12 to? I see a handwritten notation. Where does it say
13 the name of the person who holds that account?

14 THE WITNESS: That's on the infosniper.net,
15 Your Honor.

16 THE COURT: A name is on here? On 2280,
17 where is the name?

18 THE WITNESS: This is -- this is who is --

19 THE COURT: I'm asking where is the name
20 that you handwrote at the top of this? Does that name
21 appear on this document?

22 THE WITNESS: Can you say the question
23 again, Your Honor, I'm sorry.

24 THE COURT: I'm looking at page 2280.

25 THE WITNESS: Yes.

1 THE COURT: At the top, there's a
2 handwritten notation that you wrote, I suspect or
3 someone wrote it. I'm asking can you show me where that
4 name appears on this page.

5 THE WITNESS: It doesn't appear on this
6 page.

7 THE COURT: All right. Next question.

8 BY MR. MENHART:

9 Q. Mr. Hately, I wrote at the bottom -- do you see
10 the bottom URL I guess I'm referring to 2281 at this
11 point. Do you see the URL that's down there?

12 A. Yes, I do.

13 Q. Do you recognize that URL?

14 A. At the very, very bottom?

15 Q. Yes.

16 A. No.

17 Q. I realize it's cut off a little bit.

18 A. It looks like CG -- you want me to say that?

19 Cgcounter.com.

20 MR. GREENBERG: He asked did you recognize
21 it and he said no.

22 THE COURT: Asked and answered. Objection
23 sustained.

24 BY MR. MENHART:

25 Q. Are there other who-is styles of research tools

1 available online?

2 A. Right, this is just a tool to look up IP
3 addresses. The one I use is, yeah, the infosniper.net.

4 MR. GREENBERG: Your Honor, objection. Is
5 he testifying now as an expert?

6 THE COURT: Sustained.

7 BY MR. MENHART:

8 Q. Referring to page 2282, do you recognize that
9 Mr. Hatelly?

10 A. I do see it, yes.

11 Q. Okay. Tell me what this document represents.

12 A. This is similar to the one before. It's just got
13 another IP address in for the search bar.

14 Q. And what is that IP address?

15 A. It's 166.170.31.201.

16 Q. Were you aware of that IP address?

17 A. I think I wrote it.

18 MR. GREENBERG: Your Honor, I don't -- are
19 you aware? Did he look it up and know who it is? I
20 don't know --

21 THE COURT: Sustained.

22 BY MR. MENHART:

23 Q. All right. Let's move to Exhibit 18. Do you see
24 that, Mr. Hatelly?

25 A. I do.

1 Q. Can you please tell me what this document
2 represents.

3 A. This is a screen shot from my cellphone of the
4 notifications for my Facebook account.

5 Q. You took this screen shot?

6 A. I did, yes.

7 Q. When did you take this screen shot?

8 A. I got a notification on my phone that said that
9 you know, someone was trying to access my account, you
10 know, check your notifications. So I came in and
11 checked these and this is what I saw. You know,
12 these -- it says unrecognized device recently attempted
13 to access your account. Let us know if it was you.

14 Q. Thank you.

15 MR. MENHART: Your Honor, we would offer
16 Exhibit No. 18 into evidence.

17 MR. GREENBERG: Your Honor, object, on the
18 grounds of authenticity and hearsay. But I don't think
19 it's tied to Ms. Torrenzano and just --

20 THE REPORTER: I'm sorry.

21 MR. GREENBERG: I'm sorry. We agree that it
22 reflects -- this is sort of admitted in the prior
23 exhibit the Judge allowed. It's just cumulative.

24 THE COURT: All right. Objection overruled.
25 18 will be received.

1 BY MR. MENHART:

2 Q. Okay. We're going to go ahead and put this up on
3 the screen for the jury --

4 A. Sure.

5 Q. -- Mr. Hatelly. So, I realize you just laid a
6 foundation, but explain to the jury what this is.

7 A. This is the screen shot from my phone, the time
8 it's up here, 12:36 a.m. And then here it shows that,
9 you know, an unrecognized device tried to access your
10 account. And that is the same time when I looked at my
11 security logs for the Facebook account which was here
12 earlier. That shows when the password was changed.

13 Q. Referring to the second page.

14 A. Uh-huh.

15 Q. -- this -- please explain to the jury what this
16 is.

17 A. So, I was going through, and this is another
18 screen shot from my phone, um, that showed that, um, you
19 know, log-in near Winchester, Virginia, United States
20 from mobile Safari on IOS8 today at 1:30 a.m. And, it's
21 just notifying me that this isn't a device that we
22 recognize. It's just kind of informative, telling me
23 like what's going on because I don't have an iPhone.

24 Q. And then the third page of this document, we'll
25 just display to the jury, and I think we'll move on.

1 Okay, please refer to Exhibit Number 19.

2 A. Okay.

3 Q. Do you recognize this document?

4 A. Yes, I do.

5 Q. Please tell me what it is.

6 A. Okay. So, this is -- a screen shot from
7 November 3rd, um, or the November 3rd incident from my
8 laptop, um. And it's again, in the recently used
9 devices page of my Google account. Um, it shows windows
10 machine and then it says like current device which is my
11 laptop, and then it has, you know, my Samsung Note 4.
12 And then it has another laptop, another Windows device
13 in there, um, that says it was connected at -- on
14 November 3rd at 12:53 a.m..

15 MR. MENHART: Your Honor, we would move
16 Exhibit Number 19 into evidence.

17 THE COURT: Received.

18 BY MR. MENHART:

19 Q. We're going to display it for the jury.

20 A. Okay.

21 Q. And again, please, make sure that the jury
22 understands what the document is.

23 A. Can I go ahead?

24 Q. Yes.

25 A. So, this is again, the same recently used devices

1 page, that shows where you know, I took the screen shot
2 from this device here, the first one at the top. I
3 can't draw on there. And then the next one down, it
4 says Samsung Galaxy Note 4 which is my cellphone. And
5 the other device, which doesn't belong to me is a
6 Windows computer. And it says it was connected
7 November 3rd, at 12:53 a.m. And then it gives you the
8 locations, Winchester, Virginia.

9 Q. Do you know anyone in Winchester, Virginia?

10 A. I know Ms. Torrenzano worked -- lives in
11 Winchester, Virginia.

12 Q. Let's do Exhibit No. 20. We will take the one
13 off the screen and we'll ask you, Mr. Hatelly, to refer
14 to Exhibit No. 20.

15 Briefly describe what is happening here.

16 A. Okay. So, this is again another screen shot from
17 my laptop. It's under the recently used devices page of
18 my account. It shows kind of an expanded details of you
19 know, where it says Windows current device and then they
20 kind of expanded that down so you could see the name.
21 It's got Ironhide on there as the name, the browser, the
22 locations I used at that.

23 And the Windows device, which is not mine, shows
24 when it was -- you know, last synced at 8:21 p.m., and
25 then the browser it was using, the location it was used

1 from which is Winchester, Virginia. And then the two at
2 the bottom, it still got my Note 4 on there, my Samsung
3 phone. And then it still has the iPhone down there as
4 having connected October 13th -- the last connection was
5 October 13th at 3 o'clock in the afternoon. It holds on
6 to that for 30 days.

7 MR. MENHART: Your Honor, we would move
8 Exhibit No. 20 into evidence.

9 MR. GREENBERG: Your Honor, I don't object
10 to that exhibit.

11 THE COURT: Exhibit 20 will be received.

12 BY MR. MENHART:

13 Q. Okay. Let's again display for the jury
14 relatively quickly.

15 A. So, again, the -- it's from the recently used
16 devices page, shows my current device. There's the name
17 of it, um, the locations I used it from, the browser
18 type, and then the other Windows device here. Um, it
19 shows where it was last synced at 8:21 p.m., the browser
20 it was using, and then the location it was used from.
21 And these are the two. That's my phone, and that's the
22 iPhone.

23 Um, then this is -- you know, this is after I got
24 the notification that -- get that off there -- that my
25 password was reset for this account here at 8:15 and

1 then this device connected at 8:21 p.m.

2 Q. Thank you. Please refer to Exhibit No. 21.

3 We'll go ahead and take that prior one off the screen
4 and have you refer to the paper version of 21. Can you
5 just briefly describe what this is.

6 A. Sure. So, this is a screen shot from a laptop
7 where I've got the left-hand side has the browser page
8 of the recent security events from my account and the
9 right-hand side shows the -- recent activity log, the
10 same as the browser, the IP address, the date and time.

11 On the left-hand side, the recent security
12 events, it shows me that the event was a changed
13 password. It logged it at yesterday at 8:31 p.m., which
14 this was taken on November 3rd, so it was the night of
15 November 2nd at 8:30 p.m.

16 Q. And you took this screen shot?

17 A. And I took the screen shot from my laptop.

18 MR. MENHART: Your Honor, we'd move that
19 this be admitted into evidence as Exhibit No. 21.

20 MR. GREENBERG: Your Honor, I'm going to
21 object to this one. It's -- on the left side of this
22 looks like Mr. Hatelly's telephone number and his own IP
23 address. I don't see how this is tied up to the other
24 events. I know Ms. Torrenzano says in October she
25 looked at the e-mail, but this doesn't have anything to

1 do with that.

2 MR. MENHART: Your Honor, our response to
3 that is that the witness just testified as to the
4 authenticity and that the information is relevant to the
5 jury.

6 THE COURT: Whose telephone number is that?
7 Whose telephone phone number is that?

8 THE WITNESS: That's mine, Your Honor,
9 because I added the telephone number to my account. So
10 it's an event. So, it's just displayed there below the
11 password change.

12 THE COURT: All right. Objection overruled.
13 The document will be received.

14 MR. MENHART: We'll go ahead and display it
15 on the board.

16 THE COURT: 21.

17 BY MR. MENHART:

18 Q. Okay. And, again, now, you just did this, please
19 explain to the jury.

20 A. So, again, recent security events page shows when
21 the password was changed the night before. And that's
22 what we're talking about. I added my phone to my
23 account.

24 And then this is the same over here. The recent
25 activity which shows the browser, the IP address, and

1 the date and time stamped. And then at the bottom of
2 that page, if you scroll down just a little bit --

3 Q. I think that's all we have.

4 A. Okay. Okay. So, then these IP addresses here,
5 192, right here, these ones are the ones that also
6 showed up as having accessed my Facebook account.

7 Q. Did you change your password on the date
8 displayed in this document?

9 A. No, I did not change my password here.

10 Q. Please refer to Exhibit No. 22. Can you briefly
11 describe what's going on in this case --

12 A. Sure.

13 Q. -- in this document?

14 A. So, the -- in the previous exhibit on the
15 right-hand side was the recent account activity
16 information, but the bottom was cut off. So this is
17 just the full-page version of it. So you can see all
18 the way down to the bottom.

19 Also it shows, again, you know, activity on the
20 account, browser type, location, date and time, shows my
21 IP address at the bottom.

22 Q. Please go to the second page. I believe you
23 previously testified about this, but can you please
24 explain what is happening in this.

25 A. So, this is a screen shot from infosniper.net.

1 So when I put in the 192.77.126.50 IP address, it gave
2 me the geo-location, the provider, the host name, time
3 zone, city, state.

4 MR. GREENBERG: Your Honor, I'm going to
5 object to this on this ground. There is no scientific
6 evidence as to the geo-zone, and what he is now
7 testifying this document purports to indicate. I
8 understand you let him with the Facebook as a business
9 record. But now he's explaining the geo-zones and we
10 can't verify it for truth and accuracy.

11 MR. MENHART: Your Honor, our response to
12 that is that the witness will testify that these
13 services are readily available on the Internet and that
14 they can be accessed by any member of the public. And
15 that they are -- well, my suspicion is that he will
16 testify in his experience, they are reliable.

17 THE COURT: So, if it's on the Internet, it
18 must be true; is that right?

19 MR. MENHART: I'm sorry.

20 THE COURT: If it's on the Internet, it must
21 be true?

22 MR. MENHART: Your Honor, that's not
23 entirely what I would say. But, I think that in this
24 particular instance, the individual would be able to
25 testify as to this very specific part of the Internet

1 and his experience with it.

2 THE COURT: All right. I'm going to sustain
3 the objection to that. There may be pages in here that
4 might be admissible, but you'll have to show me.

5 MR. MENHART: Okay.

6 BY MR. MENHART:

7 Q. Mr. Hately, let's concentrate on -- Your Honor,
8 just to clarify, your ruling was as to the infosniper
9 screen shots?

10 THE COURT: I'm looking at all these
11 documents -- the exhibit number you're referring to is
12 Exhibit 22?

13 MR. MENHART: Yes.

14 THE COURT: All right. And the pages he was
15 just referring to have the match, right, page 1-1.

16 MR. MENHART: Yeah. So it says basically,
17 page 1-1. At the bottom left-hand portion, it says
18 infosniper.net.

19 THE COURT: All right. I'll sustain the
20 objection to his description of what they are. These
21 documents show whatever they show. Okay.

22 MR. MENHART: Okay.

23 BY MR. MENHART:

24 Q. So --

25 THE COURT: He can tell us about geo

1 positioning and all those things.

2 BY MR. MENHART:

3 Q. So, Mr. Hatelly, the Court has ruled we can't put
4 this into evidence. So I'm going to ask you to tell me
5 your experience with this particular site and what it
6 means to you.

7 MR. GREENBERG: Your Honor --

8 THE COURT: Sustained.

9 BY MR. MENHART:

10 Q. All right. We're going to move to the fifth page
11 of this document. Can you please tell me what this is?

12 A. You said the fifth page, right?

13 Q. Yes, I represent to you that it's the one with
14 Nicky Torrenzano's name on the top.

15 A. Okay. So, this is Ms. Torrenzano's security
16 account information from her Facebook. So it's the same
17 as mine where it had like, you know, my picture, and
18 then the name and then the active sessions and all the
19 account activity. But, it's just for Ms. Torrenzano.

20 Q. How did you acquire this document?

21 A. Through discovery in our custody proceeding --
22 or -- yeah, through discovery.

23 Q. And that's a lawful procedure for this?

24 MR. GREENBERG: Your Honor, I object. He
25 can't respond to that.

1 THE COURT: He doesn't have to respond to
2 that. Sustained.

3 BY MR. MENHART:

4 Q. Okay.

5 THE COURT: You got it through discovery.
6 Next question.

7 BY MR. MENHART:

8 Q. Looking about three pages beyond, you have a
9 couple sticky tabs on there.

10 A. Okay.

11 Q. Can you please tell me what is being designated
12 here?

13 A. Um, so, this is the same -- so, it's -- it shows
14 a log-in for Ms. Torrenzano's account from the exact
15 same IP address that was used to get in -- that was
16 logged in my account activity information.

17 MR. GREENBERG: Your Honor, I object. I
18 think -- I object to the document where it says
19 before --

20 THE COURT: I'm sorry. Speak clearly.

21 MR. GREENBERG: Sorry.

22 THE COURT: Speak clearly.

23 MR. GREENBERG: Yes. I object to him
24 explaining what this means in relation to the other
25 pieces of evidence.

1 If he wants to say what this evidence is, if
2 he says this is an IP address and over my objection to
3 the document itself, I understand that. But for him to
4 opine, though, that this address and then what that
5 means is beyond what he should be allowed to testify to.

6 THE COURT: Your response.

7 MR. MENHART: Our response is that this is a
8 document that he lawfully acquired. He had the right to
9 review it, and he took his personal knowledge in
10 identifying one IP address from one document to one IP
11 address to another document. That's all completely
12 within his own personal spier of knowledge.

13 THE COURT: All right. The objection's
14 overruled.

15 BY MR. MENHART:

16 Q. Okay. So, then the next page, Mr. Hatelly --
17 Court's indulgence for one second. All right. So, the
18 next document has your name -- do you see the document
19 I'm referring to? It has your name on the top?

20 A. I do. It does have my name.

21 Q. So, tell me what this document is.

22 A. So, this is just like the other account activity
23 information for my Facebook accounts, the security
24 events, the log-ins, when the password was changed, um,
25 you know, all that stuff. But, it's just for -- for my

1 Facebook account. And it was taken earlier than the
2 previous one.

3 Q. Referring to the very last page of this document,
4 you have a sticky note.

5 A. Right.

6 Q. What's happening there?

7 A. So, at the top it says password change. And then
8 it says, Tuesday, the 3rd of November at 12:30 a.m. or
9 12:30 in the morning, from the IP address, the
10 192.77.126.8 which is the same one that got into my
11 e-mail account or that showed up in my e-mail account,
12 which is the same one that was Ms. Torrenzano's.

13 MR. MENHART: Your Honor, to be clear, what
14 we're trying to do here, we're looking --

15 THE COURT: I understand what you're trying
16 to do.

17 MR. MENHART: I want -- I'm sorry to
18 interrupt.

19 THE COURT: What is your request?

20 MR. MENHART: The request is that we would
21 like to admit into evidence, and I'll show you, counsel,
22 we want to start with this page, counsel. And we're
23 going to start with this page through the end which is
24 the one that has Ms. Torrenzano's name at the top and
25 that's all of this document that we're trying to admit.

1 MR. GREENBERG: Your Honor, I understand
2 what Mr. Menhart is trying to say. He'd like to redact
3 the exhibit to show two Facebook pages, and I've noted
4 my objection before.

5 MR. MENHART: To clarify, it is not just two
6 pages. It's the first the -- from the one with Ms.
7 Torrenzano's name on the top all the way to the end.

8 MR. GREENBERG: I understood that's what you
9 wanted.

10 MR. MENHART: Okay, fair enough.

11 THE COURT: And, the other page with the tab
12 on it for Mr. Hatelly's account and his picture on the
13 front, you're offering those three things?

14 MR. MENHART: Yes, that's right, his picture
15 of his kids and then because --

16 THE COURT: Just the password change page
17 that's tabbed, 4-49?

18 MR. MENHART: Yes, that's correct. I
19 mean -- whatever Your Honor thinks is best, but we
20 submit that the -- all of this -- the quote, unquote
21 Facebook record in this particular case should be
22 properly admitted.

23 THE COURT: I'll admit just the pages tabbed
24 that you all refer to and we can discuss this after the
25 break. Thank you.

1 MR. MENHART: Okay. So, Your Honor, just to
2 be make sure I know what we can display to the jury,
3 you're saying only the tabbed pages, correct.

4 THE COURT: The tab page and the page with
5 the photograph on it, I think those are the pages you're
6 trying to refer to, aren't you, that show what the
7 address was?

8 MR. MENHART: And I just want to be careful
9 here because we would submit from the page that has Ms.
10 Torrenzano's name and her picture all the way to the end
11 of the existing Exhibit 21 as it appears in the trial
12 binder.

13 THE COURT: Oh, I see what you're saying,
14 okay. Let me just hand you this and you can tell me
15 back -- you all can look at this and tell me this is
16 what you're trying to offer into evidence and that way I
17 can be clear.

18 It's only being offered by defendant, not
19 the plaintiff.

20 MR. GREENBERG: Your Honor, may I confer
21 with Mr. Menhart?

22 THE COURT: Say again.

23 MR. GREENBERG: May I speak directly --

24 THE COURT: Sure, sure.

25 (Off the record discussion)

1 MR. MENHART: Thank you.

2 BY MR. MENHART:

3 Q. So, Your Honor, we will formally move to admit as
4 redacted Exhibit No. 21 -- 22, excuse me, the pages
5 which you just presented to counsel.

6 THE COURT: All right. Thank you very much.

7 MR. MENHART: Thank you.

8 THE COURT: They will be received over
9 objection.

10 MR. MENHART: I appreciate the
11 clarification. Okay.

12 Your Honor, we were trying to be very
13 careful for the jury. I think we've done it. We're
14 going to go ahead and display this document now to the
15 jury, the part that's been admitted.

16 THE COURT: All right.

17 BY MR. MENHART:

18 Q. Okay. Mr. Hatelly, we had a lot of fun with
19 evidence, but now I'd like you to please testify as to
20 what this is, please.

21 A. Okay, sure. So, this is just like my security
22 information from my Facebook account. It's for Ms.
23 Torrenzano's. So, it shows like her picture, her name,
24 the account status, changes, like -- and then the
25 account activity which, I don't know if you can -- if

1 that's too small to see. But it will show you -- there
2 we go, if we scroll down just a little bit, please.

3 So -- and then it will show you, you know, a date
4 and time, a location -- you know, IP address, and then
5 you know, what kind of device, iPhone, iPhone.

6 Le me get that off there.

7 Q. And then referring to the -- there's a couple of
8 green tabs on the fourth page of this document that was
9 admitted.

10 A. Okay.

11 Q. Can you please tell the jury what those
12 represent.

13 A. Sure. So, if you scroll down just one -- there
14 you go right there. That's the last one.

15 So, this showed that from on October 17th of
16 2015, from the same IP address that I was talking about
17 earlier, had logged into Ms. Torrenzano's account.

18 MR. GREENBERG: Your Honor, I object to the
19 content of the evidence, because the IP addresses we see
20 don't match that on the first document. So he can say
21 this IP logged in. I can understand that. That's what
22 he testified to. But to compare to other points of
23 evidence, I think that would be for argument for the
24 jury to determine.

25 MR. MENHART: Your Honor, our -- please let

1 us respond to that. The counsel is misrepresenting the
2 document. Because there is a specific IP address that
3 does match up.

4 THE COURT: Well, I'll let the jury be the
5 judge of that. I overruled the objection.

6 BY MR. MENHART:

7 Q. I believe you were testifying about the tabs.
8 Please go ahead.

9 A. Sure. So, there's the 182. And then if you
10 scroll up, there it says web session terminated, gives
11 the time, and the date, November 3rd at 12:27 a.m. from
12 that IP address. And then the next log-in to her
13 account wasn't -- is the next one up and it wasn't until
14 like two days later.

15 Q. So, looking at that third green tab --

16 A. Okay.

17 Q. -- what is that IP address?

18 A. This one is 192.77.126.8.

19 Q. And that's on Ms. Torrenzano's Facebook records?

20 A. And that is on hers, yes.

21 Q. Please refer to the very last page of this
22 exhibit.

23 A. Okay.

24 Q. What is that IP address?

25 A. It's 192.77.126.8. It's the same.

1 Q. Is that the same IP address?

2 A. Yes.

3 Q. Let's refer to Exhibit 23. Have you seen this
4 document before?

5 A. Yes, I have.

6 Q. What is this document?

7 A. Um, this is a subpoena request for documents from
8 Winchester Medical Center.

9 Q. Who issued this subpoena?

10 A. I'm sorry.

11 Q. Who issued this subpoena?

12 A. You did.

13 MR. GREENBERG: I don't think it's at all
14 relevant that he issued the subpoena for documents.

15 THE COURT: Sustained. I think what you're
16 trying to do is move 25, aren't you?

17 MR. MENHART: I'm sorry, Your Honor.

18 THE COURT: Aren't you trying to move
19 Plaintiff's 25?

20 MR. MENHART: Well, we were moving -- well,
21 we wanted to -- we wanted to create a foundation for
22 number 25, yes, Your Honor.

23 THE COURT: If you'd just go to 25, then we
24 can take it up.

25 MR. MENHART: We're going to do that right

1 now.

2 Actually, we're going to go to 24 first.

3 THE COURT: You don't need 24. Go right to
4 25.

5 MR. MENHART: I'm sorry, Your Honor.

6 THE COURT: Go right to 25.

7 MR. MENHART: Okay.

8 We're going to skip 24 and go right to 25,
9 Mr. Hately. Okay.

10 BY MR. MENHART:

11 Q. Do you recognize this document?

12 A. Yes, I do.

13 Q. What is this document?

14 A. Um, it's -- well, at the top it says
15 certification of domestic records of regularly conducted
16 activity. Then it's got pursuant to Federal Rules of
17 Evidence, and then a number.

18 Q. What --

19 MR. GREENBERG: Your Honor, I -- he's just
20 simply reading the certificate 90211. I don't think
21 that's necessary.

22 THE COURT: All right.

23 MR. MENHART: We're comfortable withdrawing
24 the witness's testimony on the first page of this
25 document. Let's move to the second page. I think we

1 can all agree on that.

2 Q. Okay. What is this document?

3 A. This is an audit of web traffic for user account.

4 Um, and, the user account that it was for was --

5 MR. GREENBERG: Your Honor, I think he needs
6 to lay a foundation because I don't think he has
7 anything to do with this document. The screen shot,
8 either the research on the Internet, I think it's from a
9 different custodian of records entirely, and we're going
10 to go with this in a moment, 902, and I have an
11 objection to that. But I think we should get to that
12 point.

13 THE COURT: All right. Let me ask the jury
14 to step out for a few minutes. Let me take this matter
15 up with counsel. Thank you.

16 (Jury excused at 11:02 a.m.)

17 THE COURT: You can have a seat, Mr. Hatelly.
18 What's your objection, Mr. Greenberg? I'm listening.

19 MR. GREENBERG: The documents that the
20 plaintiff seeks to introduce at this time are documents
21 that are purportedly from Valley Health Medical Records.
22 They're documents that purportedly Valley Health Medical
23 Records held in their custody based on a software
24 program created by Cisco Corporation. It has nothing to
25 do with Mr. Hatelly. Mr. Hatelly had nothing to do with

1 it at all, except that his lawyer subpoenaed the
2 records.

3 The code allows, under certain
4 circumstances, for such records to come in and be
5 self-authenticating if they comply with certain
6 conditions of Federal 90211 which also involve 8036.

7 In particular, under the fourth paragraph of
8 this particular certification, it says the records were
9 one, and this says "created at the time of the
10 occurrence of the events set forth therein by a person
11 of knowledge of said event or shortly thereafter". That
12 would be in compliant with 8036.

13 Or two, "created at the time of the
14 transmission of the information therein from a person
15 with knowledge of the information or shortly
16 thereafter". That would also be compliant with 8036.

17 In the particular document, or three,
18 "received at the time of the occurrence of the event set
19 forth therein or shortly thereafter and
20 contemporaneously incorporated into company records.
21 That is not compliant with 8036. That does not have --
22 8036 does not provide for introduction of evidence based
23 on that particular statement. So the Court would have
24 to guess which one of the three apply.

25 I would also invite the Court to look at a

1 case that I have. This case is from the Eastern
2 District of Virginia. It was from District Court Judge
3 Payne, and the Judge said that for there be
4 trustworthiness, there should be some indicia in the
5 certification that the custodian of record has
6 sufficiently knowledge of what the information is that
7 they're actually recording.

8 Now, in this particular case, what I
9 understand, I submit to the Court, is that the document
10 as is submitted is a software product created by Cisco
11 Corporation. And so basically, the idea is that the
12 custodian of records -- I don't know how they do it.
13 They don't talk about how they rely upon it. They don't
14 talk about how they keep it.

15 There is no information whatsoever about
16 this document that would show its inherent
17 trustworthiness as far as coming from Valley Health
18 Hospital.

19 THE COURT: Where do you think it came from?
20 What is your position on that?

21 MR. GREENBERG: I don't mean that it came
22 from Valley Health. You know, I misspoke. It came from
23 there, but it wasn't originated, relied upon or that
24 they do anything to show its trustworthiness or actually
25 scientific why it's relevant. This is not just --

1 THE COURT: I'm sorry.

2 MR. GREENBERG: Yes, sir.

3 THE COURT: The issue of business records
4 has nothing to do with relevance. Your challenging the
5 authenticity of the document? What are you challenging?

6 MR. GREENBERG: I am challenging the
7 authenticity of the document as they're trying to put it
8 under 90211.

9 THE COURT: Okay.

10 MR. GREENBERG: And to be very clear, I'm
11 also challenging that even the scientific reliability of
12 what the document may purport to indicate when there's
13 nobody in court that can explain why that information
14 would be correct on any level.

15 Usually the custodian of record would
16 provide some authentication, not only the records, but
17 the actual aspects of what they do so that we know it's
18 inherently credible information. And that's what Judge
19 Payne found in the similar circumstance under 90211.

20 And I would also provide that to the Court's
21 opinion -- the Court's attention to take a look at why
22 we think that this is not -- this doesn't -- this
23 doesn't allow the plaintiff to bypass the otherwise
24 needed requirement to have a qualified witness testify
25 to the -- to the -- why these records should be

1 accepted.

2 THE COURT: All right. I'm happy to have a
3 copy of your case. Do you have a copy for opposing
4 counsel?

5 MR. GREENBERG: I hope that I do.

6 THE COURT: And if you'd point me to the
7 page you're referring to, that would be very helpful and
8 opposing counsel as well.

9 MR. GREENBERG: Your Honor, I know we made
10 several copies, but since I keep it -- can I show Mr.
11 Menhart?

12 THE COURT: I want you to give him a copy of
13 it case so he can read it.

14 MR. GREENBERG: I understand, Your Honor.
15 What I'm saying is Mr. Bradley had a hard time finding
16 that. We made three copies.

17 THE COURT: All right, take your time.

18 MR. GREENBERG: Thank you, Judge.
19 Appreciate the time.

20 Your Honor, we have highlighted the one --
21 the sections that we rely upon.

22 THE COURT: All right.

23 MR. GREENBERG: Thank you.

24 MR. MENHART: Your Honor, unfortunately, I'm
25 going to have to object to this case. I'm getting an

1 unhighlighted copy, and this is the first time I've seen
2 it. He could have filed a trial brief. He didn't.

3 THE COURT: I'm sorry. I can't hear you
4 sitting down. What did you say?

5 MR. MENHART: Yes. Let me state a couple
6 objections for the record.

7 First, this is the first I've seen it. They
8 didn't file a trial brief; we did. We filed a trial
9 brief, quite frankly, that has law contrary to this. I
10 assume because I haven't been provided with the case so
11 far, so that is the -- that's the initial objection, I
12 guess.

13 THE COURT: All right. Well, my experience
14 has been in trial sometimes issues come up and lawyers
15 present cases, Mr. Menhart.

16 Do you have a copy for Mr. Menhart that is
17 highlighted, Mr. Greenberg? If you don't you can give
18 him my highlighted copy.

19 MR. GREENBERG: If I have a
20 highlighted copy, Your Honor?

21 THE COURT: Yes, let him see what you're
22 referring to so he doesn't have to go hunting around in
23 the opinion for it.

24 MR. BRADLEY: Your Honor, if I may be
25 excused just briefly?

1 THE COURT: Sure, absolutely. As long as it
2 leaves one lawyer in the courtroom.

3 Now, I don't have a copy of the opinion.

4 MR. GREENBERG: I realize it, Your Honor.
5 I'm just waiting at the podium for when you --

6 THE COURT: Okay. Finish reading it. Have
7 you read it?

8 MR. MENHART: I read it.

9 THE COURT: All right, fine.

10 MR. GREENBERG: Your Honor, I also have a
11 copy that I've given to Mr. Menhart of the rule of --
12 the Rule of Evidence 902 that relies on 11, that relies
13 on the certification. I have one more point that I'd
14 raise as well as to why it should not be admitted.

15 THE COURT: Just one second, one second.
16 Have you had a chance to review it, Mr.
17 Menhart?

18 MR. MENHART: Yes, I have, Your Honor.

19 THE COURT: All right. What's your
20 response?

21 MR. MENHART: Your Honor, our response is
22 quite frankly relatively simple. There is a clear
23 certification which was submitted by agreement with
24 opposing counsel that was before this Court last
25 Thursday. And, this was specifically provided -- we

1 were produced with this document on two separate
2 occasions; first, with a letterhead of the attorney
3 representing this group, and then secondly we were
4 presented with a second document with the exact same
5 records, and it included a pretty formal-looking
6 certification of the domestic records of regularly
7 conducted activity.

8 And this certification meets the
9 requirements of every federal rule of evidence to a T,
10 each and every document -- excuse me. Each and every
11 paragraph says indisputable, the declarant is a record
12 custodian or other qualified persons.

13 Number two, these are -- they specifically
14 referred to the records and then the bates numbers are
15 exactly what they placed on the records that they're
16 referring to.

17 They've explained that they are originals
18 and then they literally used the terms that you find in
19 the Federal Rules of Evidence in saying they were
20 created at the time. They were created with the
21 trans -- you know, with the transmission. And then they
22 were received at the proper time as well.

23 And then finally they stated the records
24 were kept in the course of regularly-conducted business
25 activity. And the records were made within the regular

1 course of business activity.

2 So even on the face of this certification,
3 the document is appropriate.

4 Now, setting that aside for a second, just
5 look at the document. It's very clear from the face of
6 the document that it has clear designations of business
7 records. It has the Cisco logo at the top right-hand
8 corner. It has the specific URL by which the record is
9 being pulled from. It has copyright notices from Cisco.

10 THE COURT: What do you mean by URL? What
11 are you referring to?

12 MR. MENHART: Sure, the uniform resource
13 locator, which would be the web address. So I'm looking
14 just below the Cisco logo at the top right-hand part of
15 the page and it says SMA-2-Valley Health link.com.

16 So on the face of the document, it's very
17 clear that this is a Cisco report that is run on this
18 URL. And then, you know, there's a variety of other
19 independent -- excuse me, variety of other indicia of
20 reliability.

21 For example, you can see the title web
22 tracking. You can see the name of the -- the software
23 program. It's called the content security management
24 appliance which is just above the words web tracking.

25 Then, beneath the words web tracking, it

1 says search criteria, user, client, IP. And they're
2 specifically looking for the documents that were
3 requested in that subpoena which we were about to
4 present to the Court.

5 So -- and then, sure enough, everything that
6 you see in that header shows up in the report. And each
7 line of this report. It has a date. It has very
8 specific computer-generated records. And, again on two
9 separate occasions in duplicate from this same party
10 with two different instances of reliability.

11 And so for those reasons, we believe that
12 this document should be admitted into evidence.

13 THE COURT: All right.

14 MR. GREENBERG: I believe Mr. Menhart
15 misspoke when he indicated it was by agreement of
16 counsel because there was no agreement whatsoever. When
17 we --

18 THE COURT: Absolutely no agreement. I'm
19 clear on that.

20 MR. MENHART: Your Honor -- I'm sorry. Can
21 I briefly address that just to clarify the record. It
22 was an agreement between myself and the third party
23 counsel, not Mr. --

24 THE COURT: Yes, that had nothing to do with
25 Ms. Torrenzano's counsel. It had nothing to do with

1 that.

2 MR. MENHART: Just wanted to make sure it
3 was clear for the record.

4 MR. GREENBERG: When we were in court last
5 Thursday --

6 THE COURT: Well, just focus on what the
7 issue. The issue here is --

8 MR. GREENBERG: Well, the issue is this part
9 here. Your Honor, it's not compliant. I know that Mr.
10 Menhart at least it's clear to him, I suppose, because
11 he says it is, that this is Cisco that was run on this
12 particular SMA Valley Health link and what this all
13 means is clear to him when he runs the URLs and what the
14 request must have been. It's not clear to me. It's not
15 self evident to me.

16 Now, as far as the custodian of records are
17 concerned, they provided them Tuesday for the first
18 time, this 90211. Not only is it not compliant with the
19 federal rules because it doesn't establish, according to
20 the Eastern District of Virginia, it's reliability that
21 the custodian knows how it was created and have anything
22 to do with the actual making of the record, this -- this
23 certificate is void on its face because it doesn't
24 comport with Section 806.

25 More importantly, so we even tried to

1 understand this better. We received this on Thursday
2 for the first time, and since --

3 THE COURT: Is this the first time you've
4 seen the records, Mr. Greenberg?

5 MR. GREENBERG: No, the records were
6 produced, um, with 1,000 plus records in a batch of
7 discovery at one time, yes, that's true.

8 THE COURT: Back in January or February,
9 right?

10 MR. GREENBERG: I don't know when we
11 received it, Judge. I don't know the answer to that.
12 And I'm not saying -- I wouldn't say it was the eve of
13 trial. I would absolutely agree with that.

14 THE COURT: So, it's not a surprise to you
15 that these records existed. They were produced to you,
16 correct?

17 MR. GREENBERG: Your Honor, what is not a
18 surprise --

19 THE COURT: I want you to answer my
20 question. These were produced during discovery, right?

21 MR. GREENBERG: They were.

22 THE COURT: Okay, go ahead.

23 MR. GREENBERG: It's not about surprises.
24 It was about preparation, Your Honor, if you don't mind
25 me saying. Because what we didn't do, though, is

1 there -- if you remember the only witness that was ever
2 called that was going to be was the lawyer, Mr. Baugher,
3 for these particular records. So we didn't -- I mean,
4 there was no expert designations, so we didn't know
5 how -- quite frankly, didn't think they could get this
6 into evidence. I mean, I could be wrong about that, but
7 the bottom line is, we didn't -- we didn't think this
8 record was coming into evidence. We didn't believe that
9 they -- there was a foundation for them. We didn't
10 brief they had the proper -- well, not even the proper,
11 they didn't have a witness. We didn't know what the
12 witness would be.

13 And then when we did get the 902
14 certification, we tried to get a hold of Eric Lider
15 (phonetics) and it turned out he was on vacation from
16 Thursday through today. We even tried to get his
17 cellphone over the weekend so we could understand as a
18 custodian, why this would be custodian records of Valley
19 Health Hospital.

20 So it seems to me it's just not appropriate
21 from the evidentiary perspective to take information
22 from a software program, download them to a hospital
23 that has nothing to do with their creation, knows
24 nothing about them, but they stick them in a drawer, I
25 guess.

1 And I'm not even sure about that, because
2 number three, part of the certification is not
3 compliant. And then it makes its way into a federal
4 courtroom.

5 Now, Mr. Hatelly is going to sit here and
6 explain to the jury what all this must mean, besides the
7 fact that he's not an expert. It's not compliant.

8 THE COURT: So, your objection is twofold.
9 First is that in your view, the certification is
10 insufficient under the Federal Rules of Evidence.

11 MR. GREENBERG: That's correct.

12 THE COURT: And the second that this witness
13 should not be testifying on what the documents mean.

14 MR. GREENBERG: That's correct.

15 THE COURT: All right. Thank you.

16 MR. GREENBERG: Thank you, Judge.

17 THE COURT: This matter is before the Court
18 on the defendant's objection to the admissibility of
19 documents contained in Plaintiff's Exhibit 25. And it
20 is twofold.

21 First, the objection is whether the
22 certification of domestic records of regularly conducted
23 activity pursuant to Federal Rules of Evidence 90211 is
24 sufficient to meet the requirements of the rule.

25 And the case cited by defense counsel,

1 Infineon, I-N-F-I-N-E-O-N Technologies, AG, 348 F.Supp.
2 2d, 698, Eastern District of Virginia, Richmond Division
3 2004 from Judge Payne.

4 In my view, having reviewed the
5 certification and the documents themselves, I find that
6 the objection will be overruled because I think the
7 certification of domestic records is sufficient to meet
8 the requirements of the rule demonstrate that this is a
9 business record.

10 I note that in looking at the actual
11 production of the contents security management appliance
12 web tracking of the end Torrenz, T-O-R-R-E-N-Z user, it
13 shows log-ins of various types on various dates.

14 And this is a computer generated report.
15 Now, maybe it's necessary to offer a person that can go
16 down inside of the code of a software to demonstrate how
17 record reports are generated, but I think that
18 authenticity has been shown sufficiently through the
19 statement of the litigation analyst Eric Lider, who is
20 the records custodian or qualified person who offered
21 the declaration.

22 And the document themselves are
23 authenticated because they demonstrate when the report
24 is made at the bottom. It says March 30, 2016. It also
25 has the Torrenz name at the top of it. And it's SMA2

1 Valley Health link.com. And it shows dates and times.
2 And this is a report that is machine generated.

3 I think this is more than sufficient for
4 purposes of authenticity. And I think that the
5 certification is more than sufficient for admissibility.

6 The objection to paragraph 4-3 that defense
7 counsel makes that was not received at the time of the
8 occurrence of the event set forth or shortly thereafter
9 or contemporaneously incorporated in the company records
10 is not well taken because this computer generated report
11 reflects dates and times with precision. And it
12 reflects actions captured by the computer.

13 So, for those reasons, the document will be
14 admitted.

15 As it relates to the question of whether or
16 not this witness can testify to what these documents
17 say, I will sustain the objection. He can't proffer
18 that this document is independently admissible as a
19 business record, and I will leave it to the parties to,
20 in their arguments, I suspect, closing arguments, or
21 examination of witnesses to point out whatever pages
22 that they think are important for the jury to refer to.

23 So, to be clear, I'm overruling the
24 objection on the grounds just stated.

25 Thank you very much. Let's take the morning

1 recess now for 15 minutes and come back and bring the
2 jury back.

3 Tell the jury we'll take our morning recess
4 for 15 minutes. Thank you.

5 MR. HENDRICK: Yes, sir.

6 (Court recessed at 11:25 a.m. and reconvened
7 at 11:42 a.m.)

8 THE COURT: You can bring our jury out, Mr.
9 Hendrick. Thank you.

10 MR. HENDRICK: Yes, sir.

11 THE COURT: Mr. Hatelly, you can come back to
12 the stand.

13 You may be seated.

14 All right, counsel, you may proceed.

15 MR. MENHART: Your Honor, we would like to
16 display the document that was just entered into evidence
17 to the jury for a brief moment just so that the jury can
18 see it and then we'll move on with the testimony.

19 THE COURT: All right. Why don't you start
20 with the page after the certification.

21 MR. MENHART: Okay. So, let's start with
22 the page after the certification.

23 THE COURT: Exhibit 25.

24 MR. MENHART: Yes.

25 THE COURT: Can you all see the document?

1 They can't see it. The actual documents themselves will
2 be presented to the jury for deliberation, so you'll
3 have a chance to look at them in more detail.

4 MR. MENHART: Okay. So, I think this
5 document has been seen by the jury, and so we're going
6 to go ahead and move on.

7 THE COURT: No, they haven't seen it. They
8 can't see it from there. The back row jurors can't see
9 it.

10 MR. MENHART: You mean the text?

11 THE COURT: Yes.

12 MR. MENHART: That is probably correct.
13 That is a very small text of document. But for purposes
14 of the trial, let's go ahead and take that out right
15 now. Take that off of the screen and then we'll
16 continue with the testimony.

17 BY MR. MENHART:

18 Q. Mr. Hatelly, I'm now representing to you or excuse
19 me, I'm now directing you to Exhibit 26. I'll represent
20 to you and the Court this is not a well-formatted
21 document.

22 But, you recognize this document?

23 A. Yes, I do.

24 Q. What is this document?

25 A. This is -- these are just all the e-mails that

1 were in my account at the time it was accessed on
2 October 13th.

3 Q. And these were the best that you had retained in
4 your account?

5 A. Right, these are messages in my account. So,
6 it's two and from, the subject line, you know, the date.

7 Q. And they were accessible to you at the time?

8 A. Yes.

9 Q. Were there electronic communications stored in
10 your Facebook account during the time of these breaches?

11 MR. GREENBERG: Your Honor, I object to the
12 phrase -- that particular phrase.

13 THE COURT: Sustained.

14 BY MR. MENHART:

15 Q. Did you maintain any other accounts where you
16 maintained electronic messages?

17 A. Yes, my Facebook account had messages in it.

18 Q. Any others?

19 A. My e-mail account.

20 Q. Any others?

21 A. Um, my LinkedIn account had messages in there as
22 well.

23 Q. Why were these messages in your respective
24 accounts?

25 A. Because they were sent to me.

1 Q. We'd like to move Exhibit No. 26 into evidence.

2 THE COURT: Received.

3 MR. MENHART: And we'll display it very
4 briefly for the jury.

5 BY MR. MENHART:

6 Q. Okay, Mr. Hately, let's go ahead and we'll move
7 on with the testimony. The jury will be able to review
8 that in more detail later.

9 What did you do after you became aware of the
10 breaches, the unauthorized accesses, I should say?

11 A. Um, I -- I tried to find out, you know, what was
12 going on. And then I reported it to the local police.

13 Q. And, who did you report the incident --

14 THE COURT: Excuse me. Come to sidebar for
15 just a second.

16 (Thereupon, the following side-bar
17 conference was had.)

18 THE COURT: Tell me what you're getting
19 ready to do.

20 MR. MENHART: Sure. The evidence we're
21 going to present here relates to investigations that the
22 Frederick County Sheriff's Office undertook in response
23 to his concerns about these breaches.

24 And the reason it's relevant for this case
25 is that we are going to have within that document

1 production from the sheriff's office records from
2 Comcast. And Comcast has records of the breaches that
3 we alleged to have occurred between Ms. Torrenzano and
4 Dr. Watts on the phone with her and the evidence from
5 Comcast is identical to our allegations as to when Ms.
6 Torrenzano and Dr. Watts were on the phone together.
7 That's the purpose of this.

8 THE COURT: I want to make sure I understand
9 what you're doing. So first, you're trying to offer
10 evidence from the Commonwealth Attorney's Office --

11 MR. MENHART: Correct.

12 THE COURT: -- about investigations they
13 conducted, right?

14 MR. MENHART: Yes.

15 THE COURT: And they're not here?

16 MR. MENHART: Well, let me clarify that.
17 The Commonwealth Attorney's Office and the sheriff's
18 office, right, were working in conjunction, so sort of
19 both had --

20 THE COURT: Did you subpoena those agencies
21 here?

22 MR. MENHART: They're not, but we believe we
23 have records that are admissible under the rules that
24 would demonstrate what records they had, and that's all
25 we're representing right now.

1 THE COURT: So then, you want to offer
2 records from police and the sheriff who are not here
3 about documents they got from Comcast that are in their
4 file and Comcast is not here?

5 MR. MENHART: That's correct. And just for
6 purposes of the record, we believe that these -- these
7 are all business records and would be admissible under
8 the rule. And I understand where this is going and so,
9 maybe it makes sense for us to put it on the record and
10 then we can move on. But we do think this is relevant.

11 THE COURT: What does it tend to prove or
12 disprove that there was an investigation?

13 MR. MENHART: The -- the purpose of the
14 investigation, and it's very limited, let me make that
15 clear.

16 THE COURT: Listen to my question. What
17 does it tend to prove about the Stored Communication Act
18 that an investigation was conducted by the police and
19 the sheriffs?

20 MR. MENHART: We're purely showing that they
21 themselves requested records and then they received
22 records, and that they used the -- and they put those
23 records in their files. Business records from Comcast
24 in their own files, and then that file has one document.
25 And if Your Honor wants we can put just the one

1 document.

2 THE COURT: I think I understand. Okay.
3 What's your position?

4 MR. GREENBERG: Your Honor, I don't think he
5 answered the question because I didn't hear what it
6 proves or disproves, except for the fact they asked for
7 information and received information.

8 So I don't think it proves anything.
9 Therefore I submit it is irrelevant. The witnesses
10 aren't here. The business records exception doesn't
11 provide for records of records of records. And quite
12 frankly, Cisco's records they are looking to include are
13 actually from David Watts . Their contention is access
14 has nothing to do with Nicole Torrenzano, except as all
15 we would argue is that she may have been on the phone
16 with him at the time he did.

17 So, I think it's extrinsic. It's not
18 relevant and the -- the Court excluded those witnesses.
19 And they're not present today.

20 MR. MENHART: And that's not --

21 THE COURT: Do you have a right to
22 cross-examine the witnesses from Comcast?

23 MR. GREENBERG: Yes, I do.

24 THE COURT: Is there an objection you have
25 about that, too?

1 MR. GREENBERG: I do. I have an objection
2 to cross-examine -- the cross-examination of the witness
3 at Comcast.

4 THE COURT: First, whatever investigation is
5 conducted is irrelevant. It does not tend to prove or
6 disprove the allegations in the complaint.

7 Second, under 403, it's highly prejudicial
8 to offer testimony about an investigation conducted and
9 there is no investigator on the stand. It's not
10 relevant, and the record you seek to offer into evidence
11 from Comcast, Comcast is not here, and it would be
12 double or triple hearsay.

13 So the objection is hearsay. Move on, so
14 those exhibits, I believe it's 20 -- 27, 28, 29, 30, are
15 excluded.

16 (THEREUPON, side-bar conference was
17 concluded.)

18 THE COURT: Objection sustained.

19 BY MR. MENHART:

20 Q. Okay, Mr. Hatelly, so, you testified --

21 THE COURT: Wait until you see the clerk sit
22 down. That's your sign.

23 BY MR. MENHART:

24 Q. You testified that you had taken certain actions
25 after the breach. What I'm going to represent to you

1 right now is that -- I want you to talk generally about
2 the actions that you undertook without necessarily
3 naming specific individuals. But, what I'm interested
4 in knowing about, I'm trying to be careful here, is the
5 time and effort and energy that you undertook.

6 A. Sure.

7 Q. Okay. So, just in your personal knowledge and to
8 the extent possible for this, I want you to try to
9 please not name names or specific places you went.

10 Does that make sense?

11 A. Sure, sure.

12 Q. Okay. So, can you please tell me generally what
13 you did after the breaches?

14 A. Uh-huh. So, I did go and -- I had called my
15 service provider for my phone account, for my bank
16 account. I don't think there's one for my social
17 network account.

18 But, I tried to get as much information from the
19 account as I could to see if I could trace what had
20 actually happened or what accounts were really gotten
21 into.

22 And so -- and I did kind of put them on watch as
23 well, that, you know, what was going on.

24 Q. How many hours would you say that you spent on
25 that?

1 A. Um, for the October 13th or the November 3rd
2 incident, for cumulative?

3 Q. I would say for purposes of this line of
4 questioning, you can keep it cumulative, sure.

5 A. Um, 20 hours.

6 Q. Did anybody write you a check for that time?

7 MR. GREENBERG: Objection.

8 THE WITNESS: No.

9 THE COURT: Sustained.

10 BY MR. MENHART:

11 Q. Did this take time away from your job?

12 MR. GREENBERG: Your Honor, actually, I
13 don't understand the relevance of this.

14 THE COURT: Sustained.

15 MR. MENHART: Your Honor, if I can address
16 that. The --

17 THE COURT: I thought we did already in a
18 hearing outside of the presence of the jury in court.
19 Didn't we address that before?

20 MR. MENHART: In my opinion, we didn't,
21 and --

22 THE COURT: Okay, then come to sidebar.
23 (Thereupon, the following side-bar
24 conference was had.)

25 THE COURT: I'm listening.

1 MR. MENHART: I would be extremely brief.

2 THE COURT: You don't have to be brief, just
3 tell me your point.

4 MR. MENHART: What we're trying to do here,
5 the defendant has introduced evidence concerning her --
6 regarding information that will be relevant to damages
7 and what we're trying to demonstrate right now, we're
8 trying to demonstrate that he spent time, effort, money,
9 in responding to this.

10 I understand there are no -- no specific
11 damages outside of cumulative damages. We understand
12 that. But we do think that the time and effort and
13 energy demonstrate that there was harm that was
14 undertaken in -- from his perspective. That's -- that's
15 what we're trying to do.

16 THE COURT: So your view then is, in this
17 case, where a person conducts an investigation, and they
18 hired a lawyer, that those are damages?

19 MR. MENHART: I'm going to need you to
20 repeat that for me, I apologize.

21 THE COURT: Your argument that the time a
22 person spent investigating a claim and bringing it to
23 court and hiring a lawyer are damages?

24 MR. MENHART: No, that's not true. The --

25 THE COURT: They're not, exactly.

1 MR. MENHART: They are -- well, they are
2 damages, but not for purposes of this case, fair enough.
3 Let's call -- I'll withdraw. That will solve the
4 problem.

5 THE COURT: Well, you can persist in your
6 objection if you want, but I think I've already ruled.
7 You don't have any damages that qualify for Electronic
8 Stored Communication Act. I ruled on that on the
9 motions hearing.

10 MR. MENHART: We understand each other. You
11 win, so --

12 MR. GREENBERG: I'm not saying anything if
13 you withdraw.

14 (THEREUPON, side-bar conference was
15 concluded.).

16 THE COURT: Remember, see the clerk
17 standing. Don't start talking until you see her sit
18 down. That lets you know when the court reporter is
19 ready.

20 MR. MENHART: I'm going to wait until the
21 fifth time you tell me that. At that time, I'm
22 definitely going to --

23 THE COURT: That's all right. I'm happy to
24 do it 7 or 8 times. I'll remind you each time you do
25 it.

1 MR. MENHART: I appreciate that.

2 THE COURT: Thank you.

3 MR. MENHART: I'll do better next time, I
4 think.

5 BY MR. MENHART:

6 Q. All right, Mr. Hatelly, I'm going to point you to
7 Exhibit 31.

8 THE COURT: Okay. You recognize that
9 document?

10 THE WITNESS: I do, yes.

11 BY MR. MENHART:

12 Q. Can you tell me what this document represents?

13 A. This is an e-mail that I sent -- well, it's a --
14 it's a chain of e-mails --

15 MR. GREENBERG: Your Honor, may I pose an
16 objection. This -- besides this being hearsay because
17 it's an e-mail back and forth with a witness the Court
18 excluded as part of a hearing we had previously.

19 MR. MENHART: This witness was not excluded.

20 THE COURT: Yes, he was. He is not here any
21 way, and it's a communication between someone who is not
22 present in the court to be cross-examined and the
23 plaintiff and is being offered for the truth of the
24 matter asserted.

25 What exception to the hearsay rule would you

1 say, Mr. Menhart?

2 MR. MENHART: Well, we believe that the
3 e-mail address near the top of the page, comma Carol K
4 at BRCC.EDU designates the individual that sent it
5 because there was a specific domain name along with the
6 name. Furthermore --

7 THE COURT: Which one of the 24 exceptions
8 to the hearsay rule is that? Of the 24 exceptions, pick
9 one.

10 MR. MENHART: Let me answer the question by
11 pointing you to another part of the document --

12 THE COURT: If you would answer the question
13 with respect to the rules of evidence that would help
14 me.

15 MR. MENHART: We believe that this can get
16 in as a business record.

17 THE COURT: All right. Objection sustained.
18 BY MR. MENHART:

19 Q. Mr. Hatelly, did you have any communications that
20 you remember from after -- strike that. Referring to
21 Exhibit Number 33 --

22 A. Okay.

23 Q. -- do you recognize this document?

24 A. Yes, I do.

25 Q. And what is this document?

1 A. Um, this shows the history for my e-mail account,
2 the password changes, times, dates.

3 MR. GREENBERG: Your Honor, I'm going to
4 object to this. Again, this is an e-mail back and forth
5 to the witness who is not presented to cross-examine and
6 the testimony before the jury and some attachment of the
7 work that he may or may not have done, I'm not sure.

8 MR. MENHART: Your Honor, the document is
9 the -- containing e-mail to a business record attachment
10 that is attached to the e-mail.

11 The e-mail indicates that it is from --

12 THE COURT: I know what it says. But it
13 doesn't qualify as a business record under the rules.
14 Objection sustained.

15 MR. MENHART: Your Honor, does that refer to
16 the final page of the document as well?

17 THE COURT: All the exhibit.

18 MR. MENHART: Court's indulgence for a
19 moment. We'll pass the witness, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. GREENBERG:

22 Q. Good afternoon, Mr. Hatelly.

23 A. Good afternoon.

24 Q. Mr. Hatelly, at one point in the direct
25 examination, your counsel asked you if you knew any one

1 in Winchester, Virginia, and you said you knew Nicole
2 Torrenzano. But you know many more people in
3 Winchester, Virginia, besides Nicole Torrenzano,
4 correct?

5 A. Not many more, no. I know very few people in
6 Winchester.

7 Q. You have done a lot of testifying about IP
8 addresses, about which IP addresses were in there. But,
9 you don't know exactly which IP address belongs to any
10 one person actually, do you?

11 You speculate that one IP address may be Ms.
12 Torrenzano and another one Dr. Watts, but you don't
13 really know?

14 A. What's the question?

15 Q. You don't know. You don't know. I mean, you're
16 aware of the fact each time someone uses a device,
17 there's a different IP address that will pop up
18 depending on the wifi they're located at. So you don't
19 really know which IP addresses.

20 THE COURT: That's three are four questions.
21 Can you ask one question at a time?

22 BY MR. GREENBERG:

23 Q. Yes. You don't know really who the owner of the
24 particular IP -- who was using something based on the IP
25 address?

1 A. Can you say your question again. You don't know
2 who is using the device?

3 Q. You don't know who is using the device from --
4 even though there's an IP address located.

5 A. Well, that would depend.

6 Q. So, you don't know? You might be able to find
7 out, but you wouldn't necessarily know?

8 A. If they're publicly available IP addresses, you
9 can look it up on the Internet. Private are normally
10 reassigned, but these are all public IP addresses.

11 Q. If right now, I pulled out my cellphone and the
12 Court allowed me on the wifi here and I went into one of
13 your accounts, the IP address would be the courthouse.

14 MR. MENHART: Objection, objection, calls
15 for speculation.

16 MR. GREENBERG: Would that call for
17 speculation?

18 THE COURT: Sustained. You're asking for
19 his opinion about things?

20 MR. GREENBERG: No, I'm -- well, he
21 testified a lot about -- okay.

22 BY MR. GREENBERG:

23 Q. So, for example, it's possible, that on your
24 Facebook account, Audrey Watts could have been accessing
25 it?

1 MR. MENHART: Objection, calls for
2 speculation.

3 THE COURT: Sustained.

4 MR. GREENBERG: Your Honor, it's not that he
5 knew -- I thought he knew it was only one possibility.
6 That's what he's leading the jury to believe.

7 THE COURT: If you would address evidentiary
8 rules that would help me. I'll give you a chance to
9 argue the case at the end, Mr. Greenberg.

10 MR. GREENBERG: Yes, I'm sorry.

11 BY MR. GREENBERG:

12 Q. What -- your testimony is, for example, when you
13 put in one of your exhibits, you -- you know that an IP
14 address at 192771268 went into your account, correct,
15 that's what you put in one of the exhibits.

16 A. That's correct.

17 Q. That's correct. You don't really know what
18 location that was or who was using it?

19 A. I looked it up online.

20 Q. But you don't know who it was that was there at
21 that moment using the device?

22 A. Well --

23 Q. You don't know?

24 A. The other -- well, I do know, though.

25 Q. So, that --

1 THE COURT: Make sure you understand his
2 question. His question is can you tell us from looking
3 at the IP address who is behind the computer screen?

4 THE WITNESS: No.

5 THE COURT: All right, next question.

6 BY MR. GREENBERG:

7 Q. Now, you had provided information on a diagram
8 that you displayed to the jury showing that in your --
9 showing, in your mind, or, in your belief, that Nicole
10 Torrenzano and Dr. Watts were communicating on the
11 phone. Correct?

12 A. Which document was it? It was the phone records?

13 Q. Yes, from October 12th and October 14th, I
14 believe, you showed both the phone records and I believe
15 you also had a white board with information on a
16 timeline. Do you recall that?

17 A. I do recall that.

18 Q. And it was your view when you composed that that
19 they were on the telephone talking to one another?

20 A. That's correct.

21 Q. And, you also mentioned they had 37 text messages
22 between each other. You had that, I think, in the
23 little scribble on the left-hand side, you were counting
24 the text messages.

25 A. That's correct.

1 Q. You don't know what they were texting about? You
2 don't know what they were talking about?

3 A. No.

4 Q. It might have been nothing to do whatsoever. It
5 might have been a problem that they had or a patient.
6 You don't know?

7 THE COURT: That's three questions. If
8 you'd ask one question at a time, it would be helpful to
9 us.

10 BY MR. GREENBERG:

11 Q. Okay. You don't know what they were talking
12 about, do you?

13 A. No.

14 Q. You don't know what they were texting about, do
15 you?

16 A. No.

17 Q. And although a computer may have entered into
18 your e-mail, you don't know how long anybody sat there?
19 You don't have an indication from any screen shots that
20 showed how long the device was connected, correct?

21 A. What's the question?

22 Q. You don't know how long the device was connected,
23 correct?

24 A. Well, actually, the -- you have the initial
25 access.

1 Q. Do you have the screen shot that shows how long
2 the device was connected?

3 A. Well, the white board has about half of it.

4 Q. Do you have a screen shot that shows how long the
5 device was connected?

6 MR. MENHART: Objection, asked and answered.

7 MR. GREENBERG: Did he answer it, Your
8 Honor?

9 THE COURT: Well, I don't want to comment on
10 the evidence, Mr. Greenberg, but the objection is
11 overruled.

12 THE WITNESS: Can you ask your question
13 again. I'm sorry.

14 BY MR. GREENBERG:

15 Q. The question is, do you have a screen shot that
16 tells you how long a device was connected?

17 A. The devices that we're talking about here, right?

18 Q. Yes.

19 A. No, not the full length of time.

20 Q. Okay. Now, you showed in it a -- you showed
21 information about Ms. Torrenzano's cellphone records
22 and -- is that correct? Right? You have her cellphone
23 records?

24 A. I showed -- yes, her cellphone records, right.

25 Q. And in one of the exhibits, you kind of put a

1 sticky note, a little arrow where you were trying to
2 show she was using the data plan in the AT&T phone
3 system, correct?

4 A. Right.

5 Q. And, you showed that there were like 78, I guess
6 kilobytes or --

7 A. Well, there was a lot of them, but the first one
8 was 78,000.

9 Q. And did you notice that two days before that,
10 there was also 78,000?

11 A. I think I saw that on there, yeah.

12 Q. You don't think she was on your computer that
13 day, though?

14 A. No, because she hadn't reset the password yet.

15 Q. The other time, that same volume was on for
16 whatever she was doing with her phone that had nothing
17 to do with you?

18 A. What was the question?

19 Q. There were other times she was on her phone where
20 the same volume of data was being used by Ms. Torrenzano
21 that had nothing to do with you?

22 A. Yes.

23 Q. And you don't know that she downloaded anything
24 from your computer, you don't have any indication of
25 that at all?

1 A. No, I don't have -- yeah, I don't -- that she
2 downloaded anything? No.

3 Q. In fact, when I asked you in deposition, you
4 don't know if she ever read an e-mail of yours?

5 A. I think that she just said that.

6 Q. She did say it.

7 A. Okay.

8 Q. But you didn't know that until yesterday,
9 correct?

10 A. Well, I -- no, I had --

11 Q. You had suspicions.

12 A. Yeah, very strong suspicions.

13 Q. But you didn't know. You didn't know if even one
14 of the e-mails was ever read?

15 A. Um, that's correct.

16 Q. Okay. In July of 2015, you confronted Nicole
17 Torrenzano because she had went into the AT&T account,
18 your cellphone account, correct?

19 A. I didn't confront her, no.

20 Q. You don't like the word confront?

21 A. Actually, I didn't say anything about it at all.
22 She brought it up.

23 Q. She brought it up. Did you prefer that you had a
24 conversation with her about it?

25 A. That would be fine.

1 Q. Okay.

2 A. But, I didn't -- the conversation didn't start
3 because I initiated it. I mean, it was Ms. Torrenzano
4 that initiated the conversation about getting into my
5 AT&T account and that's when I said, well, you know,
6 that's illegal. You shouldn't do it.

7 Q. And she disagreed with you. She felt that she
8 had equal rights to look at the AT&T account because her
9 cellphone number was teetered to it?

10 A. It wasn't teetered to it.

11 Q. But she believed that?

12 A. I don't know what she believed.

13 Q. But she told you. In the deposition, she said
14 that she thought she had the right to go --

15 MR. MENHART: Objection, hearsay.

16 THE COURT: Sustained.

17 THE WITNESS: Can you repeat the question,
18 please.

19 THE COURT: The objection was sustained.
20 He's going to ask you a new question.

21 THE WITNESS: Sorry.

22 BY MR. GREENBERG:

23 Q. You decided after you saw that she went into your
24 account that you need to change the password to the AT&T
25 account, correct?

1 A. When --

2 Q. The AT&T account in July, she said something
3 about a password. You went and found out that she went
4 into the account. You told her -- did you change the
5 password?

6 A. I did, yeah, I did.

7 Q. You did change the password. And you told the
8 jury you've never given a password to her.

9 A. That's right.

10 Q. But the password, was it nickwade918?

11 A. I believe so. I mean, I changed it. So, I don't
12 know.

13 Q. And, do you believe that she guessed that? She
14 just guessed that you would use your name and her name
15 and the date you met, September 18th, she just guessed
16 the fact that you might have that password?

17 A. I believe she guessed it, yeah.

18 Q. She guessed it. Now, didn't you also say that
19 you do IT work at INOVA, correct?

20 A. Yes, I do.

21 Q. And part of what you do have to do -- have you
22 ever tried to do something to make sure that your
23 password and your security settings were changed? You
24 changed them to make sure somebody couldn't come in or
25 out? I take it you've done that, right? You've changed

1 your passwords? You've changed your own passwords
2 before, have you not?

3 A. I have, uh-huh.

4 Q. And I think what you said -- you said in this
5 particular case, nickwade, did you have what's called
6 camel? I think that's the term you used, camel, being
7 that some letters would be tall, capitalized and some
8 would be small. Is that true?

9 A. What's your question?

10 Q. For the nickwade password, it wasn't just
11 nickwade918. It was nickwade with certain capitals and
12 certain small letters?

13 A. No, I don't think that it was -- I think the
14 first letter was capital.

15 Q. But, do you use that designation, the camel
16 designation?

17 A. Well, technically, camel case would be like the
18 first letters upper case and the next letter is lower
19 case, you know, just like, a camel.

20 Q. Correct. And did she guess that, too? Was she
21 able to guess that was your password that you did the
22 camel?

23 A. That may have been more difficult if I did it,
24 but I hadn't done it for that.

25 Q. How do you think she was able to change the

1 password to get into the account?

2 MR. MENHART: Objection, calls for
3 speculation.

4 THE COURT: Sustained.

5 BY MR. GREENBERG:

6 Q. Did she know your security settings?

7 MR. MENHART: Objection, calls for
8 speculation.

9 THE COURT: Are you asking him what he
10 thinks she did?

11 MR. GREENBERG: I'm asking whether she knew.
12 I would presume the next question is that --

13 THE COURT: So you're asking him to tell you
14 what she was thinking?

15 MR. GREENBERG: No, what she knew based on
16 what he may have told her is what I'm trying to, Judge.
17 But the way you're asking, I know where you're going
18 with that.

19 Can I rephrase the question?

20 THE COURT: No. (Laughter).

21 Of course you can. Objection sustained.

22 BY MR. GREENBERG:

23 Q. So, did you tell Ms. Torrenzano your security
24 settings?

25 A. No.

1 Q. Did you have security settings?

2 A. I guess -- security settings are pretty vague. I
3 mean perhaps you could clarify.

4 Q. So, for example, if you want to reset your
5 password, maybe they asked you what your first car was;
6 who your first teacher was, that kind of question?

7 A. So, like my password reminders, kind of?

8 Q. No, to reset a password, Mr. Hatelly.

9 A. Unique information about me?

10 Q. To reset the password, that's what you would do,
11 correct? Didn't you have to do that? Didn't you have
12 to reset your password? Have you reset your password
13 before?

14 THE COURT: That was like four questions.
15 If you would ask one question at a time, that would help
16 us.

17 BY MR. GREENBERG:

18 Q. Did you reset your password before?

19 A. Yes, I have.

20 Q. And when you did that, did you go to those
21 settings that I just mentioned in order to get that to
22 happen?

23 A. For some they're set up that way, for others
24 they're not. Are you talking about -- which one you're
25 talking about?

1 Q. How about your college account?

2 A. That one -- that one has -- we had to put in, you
3 know, what high school you went to, um, what street you
4 grew up on. I don't remember the exact questions, but
5 they're -- they're pretty standard like across.

6 Q. You -- of course, you don't have to set the truth
7 in those settings, right. You don't have to admit what
8 college you went to or high school or street you lived
9 on. You don't have to do that, do you? There's no like
10 independent verification that it be correct?

11 A. That would defeat the purpose of having it there,
12 though.

13 Q. So, you might use settings like your first
14 college was Cumberland, but you said it's a corvette.
15 So nobody would know to guess the Camero, correct?

16 A. Yeah, but then what -- I know it as a Camero. So
17 if I go to reset it and I keep putting Camero, it's not
18 going to let me into the account.

19 Q. It might confuse you?

20 A. Well, yeah exactly, you know, because I don't
21 remember it being a corvette, because it wasn't. It
22 would have been a Camero.

23 Q. So that's the reason after you changed the
24 password, you think maybe Ms. Torrenzano was able to get
25 in again? Was it your testimony she tried to get into

1 the AT&T more than one time?

2 A. After July, after I reset it, she -- you know,
3 she told me that -- I said, well you won't be able to
4 get back in now. And she said yeah, because you reset
5 the password, and I said, well, yeah.

6 Q. And then she never did?

7 A. Never did what?

8 Q. She never got in again?

9 A. No, she did in October.

10 Q. So, how did she do that? Did she do it because
11 she knew your security settings?

12 MR. MENHART: Objection, calls for
13 speculation.

14 THE COURT: Those are also two questions.
15 Sustained.

16 BY MR. GREENBERG:

17 Q. Did you change your security settings?

18 A. Security settings, you mean like --

19 Q. The questions.

20 A. The questions. I don't remember.

21 Q. Did you believe that the way she was able to get
22 into your password because she knew your security
23 settings?

24 A. Yeah, yeah, that she knew that information about
25 me.

1 Q. So, you believed that she reset the password in
2 July, looked at this account that she thought -- and
3 then, you -- but you didn't change any of that? You
4 didn't change anything to make it -- your account more
5 secure?

6 A. I did. I changed the password.

7 Q. But you knew -- she -- she had already changed
8 the password, right, using the security settings? So
9 there was no other way to do it?

10 A. Right.

11 Q. So, then you changed it to a new password,
12 correct?

13 A. Correct.

14 Q. I think your new password might have been like
15 what? You started using "to infinity" and a series of
16 numbers after it?

17 A. Uh-huh.

18 Q. And special characters, like ME and plus signs,
19 right?

20 A. Correct.

21 Q. And, I guess this is a segue. Was Nicky --
22 nickwade918 the password for your e-mail account at the
23 college?

24 A. I don't remember.

25 Q. Could have been?

1 A. It could have been.

2 MR. MENHART: Objection, calls for
3 speculation.

4 THE COURT: Sustained.

5 BY MR. GREENBERG:

6 Q. Is it true that you had papers that were due at
7 the -- at the college at the time you asked Ms.
8 Torrenzano to download something for you so she could
9 print it and give it to you so you could turn it in like
10 an assignment?

11 A. No.

12 Q. Are you confident of that?

13 A. I used to write her papers for her nursing
14 program.

15 Q. Is that -- that's a response to you know that she
16 never printed anything for you?

17 A. Yeah. I mean, she would never do -- I mean, no.

18 Q. She wouldn't print? She wouldn't know how to use
19 the print button?

20 A. I don't think she has a printer.

21 Q. Is it because she's not very technological savvy?

22 THE COURT: Is that a question?

23 MR. GREENBERG: Yes, it is, Your Honor.

24 MR. MENHART: Objection, relevance.

25 THE COURT: Sustained.

1 BY MR. GREENBERG:

2 Q. You don't know that anything was read on your
3 Facebook account, either, correct? You don't have any
4 indication of anything being read or any information
5 particularly being seen in your Facebook account?

6 A. Like -- what like?

7 Q. Like what, I don't know.

8 A. I don't know.

9 Q. Okay. Um, now, you heard Ms. Torrenzano testify
10 that she believed somebody was giving personal
11 information about her to people in the hospital setting.
12 Was that you?

13 A. The only person I know that works at Winchester
14 Medical Center is Ms. Torrenzano.

15 Q. Doesn't Dr. Watts work at Winchester Medical
16 Center?

17 A. I don't know him, though.

18 Q. How about Audrey Watts? I thought she worked at
19 Winchester Medical Center.

20 A. Not that I know of.

21 Q. You know her because you were having a sexual
22 relationship with her, right?

23 MR. MENHART: Objection, relevance.

24 THE COURT: Sustained.

25 MR. GREENBERG: Your Honor, it's not

1 relevant that he was having a --

2 THE COURT: Tell me what it tends to prove
3 or disprove about the Electronic Stored Communication
4 Act. Nothing.

5 Move on.

6 BY MR. GREENBERG:

7 Q. Well, isn't it your belief that David Watts
8 also -- don't you have a lawsuit against David Watts as
9 well?

10 MR. MENHART: Objection, relevance.

11 THE COURT: Sustained.

12 MR. GREENBERG: Your Honor, I don't
13 understand. They're trying to show.

14 THE COURT: Excuse me.

15 MR. GREENBERG: I'm asking.

16 THE COURT: Excuse me. I asked you to give
17 me rules of evidence.

18 MR. GREENBERG: Yes.

19 THE COURT: And I said many times I'm going
20 to let you argue the case at the end. But I'm not going
21 to let you all engage in irrelevant discussions about
22 things that do not matter.

23 And I've said ten times to this jury, this
24 is not a divorce case. They were never married. This
25 is not relevant. All we're focused on is the Electronic

1 Stored Communication Act.

2 It's obviously these parties have their own
3 feelings about each other. But you have to weigh the
4 credibility of all the witnesses.

5 MR. GREENBERG: Your Honor, may I just -- so
6 just, Your Honor, I thought this would go to the witness
7 bias and conflicts in evidence. I understand -- but --

8 THE COURT: Whether he had sex with somebody
9 or not doesn't show bias, Mr. Greenberg. It has nothing
10 to do with his relationship with Ms. Torrenzano.

11 Next question.

12 BY MR. GREENBERG:

13 Q. Some of the times you think your -- the last time
14 you were concerned that Ms. Torrenzano looked at your
15 account was in November 2015?

16 A. That's the last time that I'm aware of.

17 Q. And, you decided to pursue this after you loss
18 your custody case, I think it was in March of 2016?

19 MR. MENHART: Objection, relevance.

20 THE COURT: Overruled.

21 THE WITNESS: I wouldn't say -- I wouldn't
22 say it like losing custody. I mean, essentially, I
23 have --

24 BY MR. GREENBERG:

25 Q. Let me make sure your timing, though. Was your

1 timing after the custody case concluded?

2 A. It was.

3 Q. Uh-huh. And you've reported to the authorities
4 on many occasions for slights you think she's done
5 wrong?

6 THE COURT: Objection sustained. We're not
7 here about a custody case.

8 Next question.

9 MR. GREENBERG: Sorry, Your Honor. I didn't
10 mean to do that.

11 Court's indulgence. I didn't mean to go so
12 slow. I'm trying to go past the questions you wouldn't
13 like, so.

14 BY MR. GREENBERG:

15 Q. When you had reset your password, was it -- I
16 guess it took you a couple steps to have to go back into
17 your own account. That is, you received indication your
18 password had been changed, correct?

19 A. When are you talking about, July, October, or
20 November?

21 Q. Any of the three.

22 A. Okay. What was the question again?

23 Q. Each -- when you had to reset your password, what
24 happened as you go back into your account and you would
25 put in your security settings and that would get you

1 back into access.

2 A. I'm not sure I understand. Can you clarify the
3 question?

4 Q. When you had reset your passwords, the procedure
5 was that you had answered the security question, and
6 then, you would get a new password, correct?

7 A. So, I guess -- so I didn't reset the password and
8 then reset the security questions. I would answer the
9 security questions and then I would be able to reset the
10 password.

11 Q. And when you reset the password, you would gain
12 access once again?

13 A. Right.

14 Q. Did you do Google research to find out how you
15 could use anything regarding this particular set of
16 circumstances in your custody case?

17 MR. MENHART: Objection, relevance.

18 THE COURT: Sustained.

19 MR. GREENBERG: Court's indulgence.

20 BY MR. GREENBERG:

21 Q. Mr. Hatelly, the -- out of all the information
22 that you've provided to the jury today and yesterday,
23 they all resolve around the access to your account in
24 October 12 or 13th and November 2nd or 3rd, correct?

25 MR. MENHART: Objection, this wasn't part of

1 the prior testimony.

2 THE COURT: Sustained.

3 BY MR. GREENBERG:

4 Q. The dates that this all involve are -- what are
5 the dates? Is it the 2nd or the 13th of October? Not
6 the 2nd, the 13th of October, one of the dates that you
7 allege are -- that you actually admitted that she went
8 into the account, correct?

9 A. So, you're asking what are the dates for the
10 incidents?

11 Q. I'm saying one of them is the 13th of October.
12 Do you agree with that?

13 A. For what? I mean, I call it the October 13th
14 incident, but that's because like --

15 Q. Fine, October 13th incident is one of them. The
16 other one is November 2nd incident?

17 A. I call it November 3rd because that's when I
18 found out about it.

19 Q. November 3rd, that's fine, right. And then you
20 have a third incident?

21 A. Well, the -- July of 2015.

22 Q. Perfect, and any others or that's it?

23 A. Those are all that I'm aware of.

24 MR. GREENBERG: Thank you. That's it,
25 Judge.

REDIRECT EXAMINATION

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BY MR. MENHART:

Q. Mr. Hately, you previously testified that you didn't know a specific individual behind an IP address. What information can you acquire about any IP address that you would find?

A. Well, you can -- depending on what kind it is --

MR. GREENBERG: Your Honor --

THE COURT: Let's focus on this case, not any academic exercise.

MR. GREENBERG: I object. If I ask the question about IP and he asked about an opinion, it's clearly going to the opinion. So it should be the same thing. I didn't go into that testimony.

The Court -- I didn't go into that. I think it's objectionable. He's not qualified to testify.

MR. MENHART: The defense counsel just asked him moments ago about what he could identify with an IP address, and the witness testified --

THE COURT: You want to ask him a question about this case or just IP addresses in general?

MR. MENHART: I'm just following what defense counsel asked him about, and the defense counsel asked him --

THE COURT: Did you hear what I just asked

1 you?

2 MR. MENHART: I heard what you said, so I'm
3 just asking about this case, Your Honor.

4 THE COURT: Well, then ask him about this
5 case, not some academic exercise.

6 BY MR. MENHART:

7 Q. When you -- when you came to become aware of an
8 IP address that you suspected to be accessing one of
9 your accounts, what could you find out about that IP
10 address at that moment?

11 A. Well, you could find out the IP address. You can
12 find out the time. Um, you can find out what type of
13 device.

14 THE COURT: We've already seen testimony
15 about this case. What you're testifying to is just in
16 general. Objection sustained.

17 BY MR. MENHART:

18 Q. Are you personally aware of any tools where you
19 can look up an IP address on the Internet to determine
20 where that geo -- that IP address is geo-located?

21 MR. GREENBERG: Your Honor, that's expert
22 opinion.

23 THE COURT: Sustained.

24 BY MR. MENHART:

25 Q. Counsel asked you about the length of time that

1 certain IP addresses were connected to your account.

2 Does your prior testimony -- what part of your
3 prior testimony would you point to that helps you
4 address that question?

5 MR. GREENBERG: Your Honor, that has been
6 asked and answered. If he has to --

7 THE COURT: Sustained.

8 BY MR. MENHART:

9 Q. Is it possible to download something from an
10 account without having access to it first?

11 MR. GREENBERG: Your Honor, that --

12 THE WITNESS: No.

13 THE COURT: Your objection is?

14 MR. GREENBERG: That's expert testimony.

15 THE COURT: Sustained.

16 BY MR. MENHART:

17 Q. I'm going to ask a different question. We'll see
18 what Judge Lee says.

19 Can you download something from your VCCS.EDU
20 account, any type of content in it without first having
21 access to the account.

22 A. No, you need to have access first.

23 MR. GREENBERG: Your Honor, I object. I
24 think it's expert testimony. Some people can.

25 THE COURT: General questions --

1 MR. MENHART: Well, Your Honor --

2 THE COURT: Let me finish. I listened to
3 you.

4 General questions that call for opinion
5 would require an expert. This witness is a fact
6 witness.

7 Objection sustained.

8 BY MR. MENHART:

9 Q. Mr. Hately, what was your first car?

10 MR. GREENBERG: Your Honor, I --

11 THE WITNESS: Ford Ranger.

12 MR. GREENBERG: I object to the relevance of
13 that. I don't know that that matters.

14 THE COURT: Sustained.

15 BY MR. MENHART:

16 Q. Why did you not file this lawsuit until after
17 your custody case was completed?

18 A. I thought it was a lot to do both cases at the
19 same time. And, I wanted one to be complete before we
20 moved on to the next one.

21 MR. MENHART: No further questions.

22 THE COURT: You can step down, sir. Thank
23 you.

24 (Thereupon, the witness withdrew from the
25 stand.)

1 MR. MENHART: At this point, the plaintiff
2 would rest, Your Honor.

3 THE COURT: All right, plaintiff rests.

4 MR. GREENBERG: Your Honor, may I -- we have
5 a short time to contemplate whether or not we want to do
6 a Rule 50?

7 THE COURT: I'm sure you've thought about
8 that before now, Mr. Greenberg. I'm ready to hear it.

9 MR. GREENBERG: You want to have it in front
10 of the jury, Your Honor?

11 THE COURT: Do you have one? I'll send the
12 jury out.

13 MR. GREENBERG: I do have one.

14 THE COURT: All right, ladies and gentlemen
15 if you'd go out. I'll take up a matter outside the
16 hearing of the jury with counsel.

17 (Jury excused at 12:33 p.m.)

18 THE COURT: You may be seated.

19 MR. GREENBERG: Your Honor, I have a case
20 and I realize I don't know that Mr. --

21 THE COURT: Tell me what the issue is of
22 your motion, Mr. Greenberg.

23 MR. GREENBERG: The issue of my motion, Your
24 Honor, is I don't believe there has been demonstrated as
25 a matter of evidence that any of the access went to a

1 remote that -- that went into a facility that stores
2 communication for the purposes of backup. I don't think
3 there's any evidence whatsoever that there was a stored
4 communication that Ms. Torrenzano went into.

5 I understand that she may have looked at his
6 e-mails as they were part of a college account. She
7 admitted to that. There is no statement whatsoever of
8 their being -- that such e-mails were in a stored
9 capacity, even stored irrespective of being for backup
10 purposes.

11 I believe that the law is clear that the
12 burden on the plaintiff in the Stored Communications Act
13 is to show that somebody accessed a facility that stores
14 communications for the purposes of backup.

15 I have a case that I think is instructive.
16 It is a case from the Supreme Court of South Carolina.
17 It, oddly enough, has almost identical facts. It's a
18 broken down domestic case where they were looking at one
19 another's e-mails. And the Court goes through all the
20 findings of Stored Communications Act and finds that the
21 fact that one of the spouses or the ex-spouses looked at
22 the other one's e-mail account was not sufficient to
23 support a finding of the Stored Communications Act.

24 I recognize it's not binding on this Court
25 as a federal court, but the Supreme Court of South

1 Carolina went through it. It may be instructive and the
2 Court may want to consider that and the rationale behind
3 it as the facts are nearly identical to the facts that
4 we have in this case.

5 That -- that's the essence of my motion.

6 THE COURT: That's your motion? Is that it?
7 I'm happy to read the case.

8 MR. GREENBERG: I also have -- Your Honor, I
9 would also point out to you that -- thank you.

10 The second part of my argument would be that
11 under the act of which the plaintiff proceeds, there's a
12 requirement that under the definition of electronic
13 communication means any transfer of signals, signal
14 writings, et cetera from a system that affects
15 interstate or foreign customers.

16 I don't believe there's any evidence
17 introduced during the course of the proceedings today or
18 yesterday at all that would indicate that any facility
19 that may have been accessed affects interstate or
20 foreign commerce.

21 Those are my two points, Your Honor.

22 THE COURT: All right. Do you have a copy
23 of the case that you referred to for counsel or for me?

24 MR. GREENBERG: Yes, I do.

25 THE COURT: If you would pass them up.

1 Thank you.

2 I'm ready.

3 MR. MENHART: Your Honor, we have two
4 responses to this.

5 First, as counsel properly noted, this
6 case -- while I haven't reviewed every minute -- every
7 word of it, it not been supplied before this minute, the
8 law is simply not binding. It's South Carolina law.

9 The Fourth Circuit has quite a bit of law
10 that is supporting our position which is that the e-mail
11 communications that -- that web-based e-mail
12 communications accounts which all of these are LinkedIn,
13 Facebook, the VCCS account, those would all be under the
14 definition of the act.

15 As to the second point, and if the Court
16 would like me to read the case and address it in more
17 detail after the break, I'm happy to do that.

18 As to the second fact, we believe that the
19 Court can take judicial notice of adjudicated facts
20 under rule -- Federal Rules of Evidence 201 that
21 Facebook and LinkedIn are multiple national brands, and
22 that folks have those accounts all across the country.

23 And, then the VCCS account it's relatively
24 clear from Exhibit 26 that Mr. Hatley is having a
25 variety of communications with people across the

1 country.

2 So, we believe that on its face demonstrates
3 that there is interstate commerce at play here. So,
4 that would be our response.

5 MR. GREENBERG: Your Honor, can I briefly
6 respond to the last point?

7 THE COURT: You can.

8 MR. GREENBERG: Thank you.

9 MR. GREENBERG: Your Honor, I don't believe
10 there's any evidence about a LinkedIn e-mail that was
11 ever received, obtained, that would -- in contemplation
12 of act. Nor when Mr. Hatley was asked that he said he
13 had any idea that anyone looked at any of his e-mails or
14 communications in Facebook.

15 So, he also said --

16 THE COURT: Is it required that someone read
17 e-mail in someone else's account to be in violation of
18 the Stored Communications Act, Mr. Greenberg?

19 MR. GREENBERG: I submit that it is, and
20 I'll tell the Court why I believe that.

21 THE COURT: You have a case that says that
22 or is this just your belief?

23 MR. GREENBERG: No, no, there are cases that
24 say that. It's not just my belief. I'm not the
25 authority here.

1 THE COURT: Okay. Well, you're the lawyer.
2 So, if you have a case that you want to call the judge's
3 attention to, now is your time.

4 This case has been pending for more than a
5 year. I assuming you all did all the research on it,
6 right?

7 MR. GREENBERG: Your Honor, I have -- let me
8 ask -- I know enough to answer the Court's question
9 first and then I'd like to embellish the answer with, I
10 think, additional facts which I think is appropriate.

11 THE COURT: All right.

12 MR. GREENBERG: Your Honor, I don't have
13 with me, which is, I'm sorry, I -- I'm aware of the fact
14 and I will submit to the Court because I believe this
15 may have been from you, Judge Lee, that there is a
16 question about whether the Stored Communications Act
17 applies to e-mails that have been read but still pending
18 transmission or already opened.

19 And there is case law about whether or not
20 where it is -- if it's pending transmission but hasn't
21 been opened yet, then it's part of the stored
22 communication.

23 All that begs the fact that there must have
24 been someone reading a communication. If access alone
25 was enough, then the Fourth Circuit, the Eighth Circuit,

1 the Ninth Circuit, nobody would have to figure out
2 whether the e-mail in question was pending transmission
3 because it would be irrelevant.

4 Once you demonstrate that the defendant
5 accessed the facility, whether he obtained an e-mail or
6 not, then it wouldn't make a difference. You see, the
7 access was the critical point and then, that would be
8 the end of the conclusion.

9 But, the Courts -- and the Fourth Circuit I
10 know hasn't weighed in on that, but the Court recognized
11 it to be an open question. Does it matter whether or
12 not the e-mail has yet been read?

13 Now, there's no evidence here that any of
14 the e-mails she read were pending that transmission.
15 There is just no evidence of that.

16 So I would submit to you, that yes, they
17 have to -- they do have to establish that something was
18 obtained. I would also point out to you that the
19 complaint filed in this case only talks about obtaining
20 e-mails. There are several parts of the statute, but if
21 you look at the complaint here, the complaint does not
22 talk about any other aspect of the statute except
23 obtaining electronic communications.

24 And so what we were put on notice for and
25 what we're defending against is the obtaining of

1 electronic communication. And then the question is
2 while such is in the system, while it is in the system
3 for the purposes of backup -- for backup purposes.
4 Sorry to be inartful there.

5 THE COURT: All right. Do you have a copy
6 of the complaint handy?

7 MR. GREENBERG: Yes, sir, I do.

8 THE COURT: Okay. Your reference to e-mail,
9 I suspect, is from paragraphs 33 and 34, which refer to
10 plaintiff's Gmail account. That's probably what you're
11 referring to, and I understand why you would say that.

12 And then, in paragraphs 19 and 20, there's
13 an allegation that on October 13, 2015, both defendant
14 and that's single but should be defendants, plural,
15 hacked into several more of plaintiff's accounts,
16 including USA Banking, AT&T personal cellphone, and
17 plaintiff's school account which is powered by Google
18 mail.

19 I'm looking at document number 21.

20 MR. GREENBERG: Yes.

21 THE COURT: Page three of 18, paragraph 19
22 and 20. So, your statement is all e-mail I think is a
23 little bit -- the allegation refer to that. And when we
24 will go to the causes of action, the causes of action
25 incorporate the paragraphs I just referred to.

1 Now, let me take a look at the actual
2 complaint's cause of action under Stored Communications
3 Act. Let's see if there's any reference to -- it does
4 refer to e-mails in paragraphs 87, 88, 89, and 90.

5 So, it's all basically e-mail for this
6 count. So, you've accurately recorded that, just
7 e-mail.

8 So, as I understand your argument and I want
9 to make sure I have it right, it's just the argument
10 that we have heard and seen briefed several times and
11 that is whether an e-mail remaining on an e-mail server
12 like Gmail, that's been opened or unopened, is stored
13 first for backup within the meaning of the Electronic
14 Stored Communications Act.

15 That's an open question. There have been
16 two different lines of authority. One that agrees with
17 you and one that agrees with the plaintiff.

18 Is there a Fourth Circuit case that says one
19 way or the other about e-mail, Mr. Greenberg?

20 MR. GREENBERG: No, not that I'm aware of,
21 Your Honor, but I would say this.

22 THE COURT: I'm listening.

23 MR. GREENBERG: I would say, though, that my
24 argument is a step higher because it's also about the
25 evidence in this particular case.

1 In another case where the same arguments
2 were made, though, they had a witness that came and
3 testified, an expert witness, about what it meant to
4 have eight different copies so that one would be stored
5 for communications.

6 It is true that we've made this argument
7 before under 12(b)(6) motion. We made arguments that
8 they fail to state a claim because we did not think
9 that which is true.

10 But now our claim is based on law but also
11 on the facts of this particular case, because no expert
12 and no one has testified anything about backup storage.

13 We have no information that there was a
14 facility that she accessed at the time she accessed the
15 e-mail in question was in a stored -- was there for
16 backup purposes, not just stored, but stored for backup
17 purposes.

18 So, it's incumbent upon the plaintiff not
19 just have -- I mean, there may be an open question of
20 law but also the facts. So here I would say it's two
21 points. There isn't the fact to support it and then as
22 you point out, Your Honor, that also the fact that I
23 think the law may be in equipoise.

24 The Eighth Circuit clearly does not favor
25 it. Even the Ninth Circuit has a footnote that if it's

1 in remote storage it's not sufficient for backup
2 purposes.

3 But we don't even have the next part. We
4 don't have anything about backup here, so it's both
5 factual and --

6 THE COURT: What does backup mean to you,
7 Mr. Greenberg?

8 MR. GREENBERG: Well, Your Honor, when I was
9 in the court before with you, you said to me that the --
10 this court every Friday of some day, I don't know what
11 day it is, backs up its server and then sends it over
12 to, I think Louisiana, somewhere in Louisiana. And
13 that's where the records are kept for the courthouse
14 here.

15 And so that would be backup. If I -- if I
16 received an e-mail, and if that e-mail -- and then, I
17 decided or even if I get a letter. If I get a letter
18 from another lawyer --

19 THE COURT: Let's focus on e-mails. Just
20 focus on e-mails.

21 MR. GREENBERG: Okay. Well, what I'm giving
22 you is examples. I guess I'm going old school to
23 backup.

24 So if I take a letter and I Xerox it, I take
25 a copy. I have a second copy. That's my backup copy.

1 Or even if I scanned it and put in up in the server, I
2 have my copy and I have my backup copy.

3 So, for example, Mr. Hatelly's testimony, he
4 says that he has an e-mail in his account. He says he
5 presses the send button and if you look it doesn't
6 delete. Now, he sent it to somebody, but it's sitting
7 there.

8 Now, is it there for backup purposes or is
9 it just there? So, the backup --

10 THE COURT: What does "just there" mean,
11 because --

12 MR. GREENBERG: Well, maybe it's stored.

13 THE COURT: Let me focus my question.

14 MR. GREENBERG: Okay.

15 THE COURT: My question has to do with the
16 sent folder. And let's not act like we don't know what
17 e-mail is. There's an inbox and there's a sent folder.

18 MR. GREENBERG: Yes, sir.

19 THE COURT: What is -- how would you
20 characterize e-mail in a sent folder, Mr. Greenberg?

21 MR. GREENBERG: I would characterize you
22 still have a copy of it. You don't have a backup copy,
23 but you have a copy. And if you delete --

24 THE COURT: You have a copy of it?

25 MR. GREENBERG: That's correct.

1 THE COURT: All right. And so the copy has
2 been retained because you made a judgment that every
3 e-mail you send out should be stored in the sent folder;
4 isn't that right?

5 MR. GREENBERG: Well, I didn't know if I
6 made -- Your Honor, I don't know that I made a decision,
7 but I didn't delete it.

8 THE COURT: You didn't delete it.

9 MR. GREENBERG: Fair enough, fair enough.
10 But that's not a backup copy.

11 THE COURT: What is it then?

12 MR. GREENBERG: It's just a copy. It's just
13 something I have. It's like having a --

14 THE COURT: It's just a copy. I got it.
15 Thank you.

16 Your response? I think I understand your
17 position.

18 Let me do this. I'm going to deny the
19 motion under Rule 50. We'll see what the jury does.
20 And, if I have to write an opinion about e-mail stored
21 on a sent folder in a Gmail account or just stored on a
22 server remote Gmail or Facebook, I'll issue a written
23 opinion.

24 But as it stands right now, I'm going to
25 deny the motion.

1 As it relates to interstate commerce, I
2 don't think there's any question whatsoever about the
3 evidence of Facebook being interstate. There's no
4 question that AT&T is interstate, and there's no
5 question in my mind about Gmail being Internet. So the
6 motion is denied.

7 Ready to bring the jury back? We get them
8 back for ten minutes and take a recess at 1.

9 (Jury present at 12:48 p.m.)

10 THE COURT: You may be seated. Thank you
11 for your patience, ladies and gentlemen.

12 The plaintiff has rested.

13 Defense?

14 MR. GREENBERG: Your Honor, we have no
15 evidence to provide.

16 THE COURT: Defense rests?

17 MR. GREENBERG: Defense rests.

18 THE COURT: All right, thank you.

19 Ladies and gentlemen, we're going to take a
20 recess now for lunch from now until -- I'll make the
21 time 2:30. That will allow me time, hopefully, to get
22 the jury instructions done. If it's not exactly at
23 2:30, understand it's me working with the lawyers on the
24 instructions. And I'll have to take the time to do
25 that.

1 As I promised, I will give you written a
2 copy of the instructions.

3 So remember my previous recommendation --
4 previous admonishments, not that you've done anything
5 wrong, but my previous instructions which is not to
6 discuss the case. Don't make -- permit the case to be
7 discussed in your presence. Leave your notes in the
8 jury deliberation room and we'll come back at 2:30.

9 Thank you.

10 (Jury excused at 12:50 p.m.)

11 THE COURT: Have you all talked about
12 instructions and maybe ten minutes or so will give me
13 enough time to look over what we have.

14 MR. GREENBERG: Your Honor, we've gone back
15 and forth with the ones we've agreed upon should have
16 some changes.

17 MR. MENHART: I think based on what
18 happened, we can have discussions and make some
19 decisions.

20 THE COURT: Are there any disputed
21 instructions for me to decide?

22 MR. GREENBERG: There were as of yesterday
23 morning.

24 THE COURT: Well, how much time do you need
25 to take them up? I can take a 10 or 15 minutes break.

1 We can come back and knock them out now?

2 MR. MENHART: For plaintiff's perspective
3 that works.

4 MR. GREENBERG: Sure.

5 THE COURT: Okay. 15 minutes and we'll come
6 back and knock out these instructions. Thank you.

7 MR. GREENBERG: Okay.

8 (Court recessed at 12:50 p.m. and reconvened
9 at 1:07 p.m.)

10 THE COURT: Counsel, you may remain standing
11 or seated during this part of the presentation. It
12 would be helpful if you keep your voices up or use the
13 microphone because that might help the court reporter
14 reach what we're doing.

15 The way I intent to approach this may not be
16 exactly in order. And the way I have them are -- start
17 with the verdict form proposed by the plaintiff and the
18 defendants.

19 I don't think we need an interrogatory
20 verdict form. So, I'm not prepared to give one unless
21 somebody still feels strongly about it. I don't see why
22 we need an interrogatory verdict form.

23 MR. GREENBERG: Your Honor, may I ask what
24 the Court's --

25 THE COURT: I'm proposing to use a plain

1 vanilla verdict form that says, "Do you find by the
2 preponderance of the evidence that defendant violated
3 the Stored Communications Act" and then a separate
4 inquiry about whether or not punitive damages are
5 appropriate.

6 MR. GREENBERG: I agree with that, instead
7 of having the whole.

8 MR. MENHART: That's fine.

9 THE COURT: All right. There are a number
10 of joint instructions, and I think the one that should
11 be removed are the use of interrogatories, plaintiff's
12 J02.

13 MR. GREENBERG: Use of interrogatories, we
14 agree to remove that.

15 THE COURT: There are -- no interrogatories
16 were used.

17 J09 having to do with testimony of a law
18 enforcement official, remove that.

19 MR. GREENBERG: Yes.

20 THE COURT: PA, general preliminary
21 instruction about how the Court's going to -- jury
22 should consider the evidence, I think I did that using
23 my own form of instructions so I will take that out. We
24 won't need that.

25 Going over to PB, jury questions, which

1 allows the jury to submit questions. I don't do that,
2 so that was not done in the trial. So we don't need
3 that. Any objection?

4 MR. MENHART: No objection, Your Honor.

5 MR. GREENBERG: No.

6 THE COURT: All right. I know that there
7 was an objection to plaintiff's C which is impeachment
8 of witnesses because of inconsistent statements. It
9 appears to be a pattern instruction from the Eleventh
10 Circuit. I'm not sure what the objection could be of
11 the defendant to that.

12 MR. GREENBERG: Your Honor, I recognize it
13 is a valid state of law. And I suppose our argument is
14 that there is nothing that was -- nothing actually
15 provided in as an inconsistent statement.

16 Mr. Menhart, I'm sure, will try to disagree
17 with that, not try, but will disagree with that.

18 THE COURT: That wasn't -- also, there was a
19 couple questions that Ms. Torrenzano was asked, and her
20 answers at the deposition were different than the
21 answers she gave in court.

22 MR. GREENBERG: Your Honor, if you think
23 that was based on the facts, I don't object.

24 THE COURT: All right. Then, plaintiff's C
25 will be given.

1 The next one is adverse inference from
2 invocation of the privilege against self-incrimination.
3 And I recognize that I have two different competing
4 instructions.

5 Apparently the defendant has prepared his
6 instruction using *Greenwald versus United States*, a 1957
7 case, and *Empress Casino*, a Seventh Circuit 2016 case.

8 And the plaintiff has used the -- it looks
9 like the New York pattern jury instruction and also
10 language from the *Baxter* case from the U.S. Supreme
11 Court, 1976 and the *ePlus* case.

12 I'm inclined to --

13 MR. GREENBERG: Your Honor, may I make a
14 point before you --

15 THE COURT: Yes.

16 MR. GREENBERG: Your Honor, we'd like to
17 submit that we, at that point, our client may have been
18 taking the Fifth Amendment. So this procedure before
19 the jury should she have taken the Fifth, and I think
20 whether an inference should or shouldn't be instructive
21 would make sense.

22 It's our position now that neither of those
23 instructions should be given because in this proceeding,
24 she didn't take the Fifth. So, they may use that as
25 inconsistent statement if that's what it is that she

1 took it before. But because she didn't take it in front
2 of the jury, we would say there's no reason to give an
3 inference that she -- a negative reference she once took
4 the Fifth.

5 I don't know that that clouds the evidence
6 of what she provided before the jury today. So I would
7 submit that neither of them be given. I'm aware of the
8 one that Mr. Menhart put in, the strongest possible
9 inference. I don't know what that does as far as
10 credibility over and above what she testified to, but it
11 seems to me that if you look at the whole, you have that
12 covered by an inconsistent statement and the credibility
13 of the witnesses, and you've mentioned a couple points
14 that she may have made that are inconsistent during her
15 testimony.

16 But it just seems inappropriate, unduly
17 prejudicial to her at this point to also add that maybe
18 there should be inference taken that she ever decided to
19 take the Fifth.

20 THE COURT: All right.

21 MR. MENHART: The record reflects in the
22 deposition testimony that she took the Fifth Amendment
23 and that was read into the record. So for purposes of
24 this trial, I mean, that's in front of the jury. So, we
25 believe that instruction should be given.

1 THE COURT: What aspects of the Fifth
2 Amendment do you recall she took, Mr. Menhart?

3 MR. MENHART: She took a -- she took the
4 Fifth Amendment, I assume, on many many different things
5 in her deposition, among other things, you know. And
6 the Court didn't allow this, but her prior relationship
7 with Dr. Watts, but also some things that were in our
8 opinion questionable about her own phone number, for
9 example.

10 So, you know, those are the types of things
11 that came up in the deposition and that was being in
12 front of the jury as to the record of this case in this
13 specific proceedings. So, that's why we believe it
14 should still be given.

15 THE COURT: All right. Well, let me say
16 that a witness has a right to invoke the Fifth Amendment
17 in a civil case any time they think they should. And
18 they are ill advised to start selectively answering
19 questions that bear on the Fifth Amendment because that
20 might result in the waiver.

21 So it's completely understandable that she
22 would take the Fifth Amendment as to every single
23 question asked. That might be good practice to do that.

24 I'm concerned about whether there's a reason
25 to have it in this case where she answered questions.

1 But your point is that she did not answer questions at
2 the deposition.

3 MR. MENHART: Correct, and that was part of
4 the record in this specific trial.

5 THE COURT: Well, I have problems with your
6 answer about the strongest inference against the person
7 invoking the privilege and evidentiary issue during the
8 trial. And so, what I'll do is this. There was --
9 there were questions asked of Ms. Torrenzano in
10 deposition where she asserted the Fifth Amendment. And
11 then, here, in trial, she gave her own answers. And,
12 there's no way for the plaintiff now to contradict what
13 evidence she gave here in court for the first time.

14 So, she did in my view assert the Fifth
15 Amendment in connection with the case because the
16 deposition is a part of the case.

17 I will not give the plaintiff's instruction
18 because I think that it does not state the law. And I
19 think the defendant's statement -- defendant's 19 more
20 accurately reflects the law, and I'll give defendant's
21 19.

22 MR. GREENBERG: Thank you, Your Honor.

23 THE COURT: Do you maintain the objection to
24 preponderance of the evidence, Mr. Greenberg? It's jury
25 instruction E. It looks like it's a plain forward --

1 MR. GREENBERG: Your Honor, if you would, it
2 may help you just to -- I think -- well, that one,
3 because we were offering defendant's 4 and they have
4 plaintiff's E, and if you look at the two you can decide
5 which one would be more appropriate.

6 I think -- I didn't notice, you had --

7 THE COURT: Defendant's 4?

8 MR. GREENBERG: Yes, sir.

9 And, you edited it, actually because we had
10 two other -- which was --

11 THE COURT: I have defendant's 4.

12 MR. GREENBERG: -- kind.

13 THE COURT: I think that the plaintiff's
14 instruction on preponderance of the evidence is more
15 fulsome than the defendant's. So I will give
16 plaintiff's E and deny defendant's 4.

17 MR. GREENBERG: Your Honor, may I just say
18 one part about our instruction that may be considered
19 also adding to theirs which is that we also put in this
20 fact that the defendant does not have a burden to
21 disprove plaintiff's claims. We have no burden coming
22 forward. I want to make sure it's clear it's not who
23 has the best story, but whether they've proven their
24 case.

25 THE COURT: Well, I think the first

1 paragraph states that the plaintiff has to prove its
2 claim. So, it's not necessary to say what the defendant
3 doesn't have to prove anything. That's what the
4 instructions says.

5 MR. GREENBERG: Yes.

6 THE COURT: So I'm not going to give
7 defendant's 4. Thank you.

8 MR. GREENBERG: Thank you.

9 MR. MENHART: Your Honor --

10 THE COURT: Yes.

11 MR. MENHART: Just to clarify, you said you
12 were going to give the plaintiff's PE?

13 THE COURT: Plaintiff's PE, exactly and deny
14 defendant's 4.

15 MR. MENHART: Just for the record, on the
16 first line of that instruction, there is one typo that
17 says plaintiff Patrick, which we bring that to the
18 Court's attention and we remove the area.

19 THE COURT: Plaintiff's Patrick Hatelly,
20 that's what it says in my copy.

21 MR. MENHART: Well, things are fine.

22 THE COURT: I think that's right. Okay.
23 The next one I have that there's an objection is
24 plaintiff's F, and this has to do with --

25 MR. GREENBERG: Your Honor.

1 THE COURT: -- punitive damages.

2 MR. GREENBERG: Your Honor, we have no
3 objection to plaintiff's F.

4 THE COURT: All right. Plaintiff's F will
5 be given.

6 MR. GREENBERG: Oh, wait.

7 Your Honor, this is not the one for -- we
8 thought this was, too, but this is not about punitive
9 damages.

10 THE COURT: Oh, it's about damages in
11 general?

12 MR. GREENBERG: Yes, sir.

13 THE COURT: Okay. So, we -- do you have an
14 instruction on punitive damages, Mr. Menhart?

15 MR. MENHART: Yes, we do.

16 THE COURT: All right. Let's put
17 plaintiff's F aside, put aside for right now. We may
18 not need it.

19 So, the next one apparently is plaintiff's
20 G, which is the Stored Communications Act elements and I
21 think that there are multiple instructions on the
22 elements.

23 MR. GREENBERG: Your Honor, may I --

24 THE COURT: Yes.

25 MR. GREENBERG: With regard to plaintiff's

1 G, if you also look at plaintiff's H which I think G is
2 just a small part of what is -- full instructions. And
3 then, if you agree with that, then I would ask that the
4 Court look at defendant's nine, and then you could
5 decide -- rule which one you think is appropriate.

6 I'm not sure whether plaintiff's PG adds to
7 the element of construction.

8 THE COURT: All right.

9 MR. MENHART: Your Honor, we can withdraw
10 our PG.

11 THE COURT: All right, PG is withdrawn.

12 So, now we're looking at plaintiff's H and
13 defendant's nine.

14 MR. GREENBERG: Yes, sir.

15 MR. MENHART: Your Honor --

16 THE COURT: Yes.

17 MR. MENHART: -- just make something
18 perfectly clear. We took this -- we took these elements
19 that appear in here directly out of Your Honor's order
20 on the motion for summary judgment. And, we provided
21 the same references that Your Honor did in that
22 document.

23 So -- and then our other point is that we
24 believe that jury instruction D9 as a fourth element.
25 I.e., instead of the three elements that the Court

1 identifies in the motion for summary judgment order, the
2 defendant's instruction creates a fourth element. And
3 we think that's an improper construction of the law and
4 for that reason our instruction should be adopted.

5 MR. GREENBERG: May I respond to that?

6 THE COURT: Yes, please.

7 MR. GREENBERG: Your Honor, I think that
8 when the Court is ruling on the motion for summary
9 judgment, it's ruling in terms of law of issue for
10 the --

11 THE REPORTER: I'm sorry. You need to speak
12 up.

13 MR. GREENBERG: You want me to start again?
14 I'm sorry.

15 Your Honor, it is our contention that when
16 the Court ruled on the summary judgment motion, it was
17 making a ruling of law based on the arguments then
18 submitted by the parties, but wasn't fashioning an
19 element instruction for the purposes of a jury
20 instruction and the elements of the law which is
21 completely different.

22 I think the Fourth Circuit has even noted
23 that the fact that a statement is made in the Fourth
24 Circuit holding doesn't mean it's appropriate to be a
25 jury instruction.

1 Now, you can use that. It can be evidence.
2 It could be -- certainly support a crafted jury
3 instruction. But in this case, for Mr. Menhart, which I
4 think he suggests to make it determinative, I disagree.
5 And we gave you instruction that we think properly sets
6 forth all of the elements of the Stored Communications
7 Act.

8 THE COURT: Your citation is just to the
9 statute, correct?

10 MR. GREENBERG: Yes, that's correct.

11 THE COURT: And the citation that plaintiff
12 has given me is Sand and Siffert Model Jury Instructions
13 Section 65.06 which I cited in the order, correct?

14 MR. GREENBERG: Which --

15 THE COURT: Which I cited in my order.

16 MR. GREENBERG: I don't remember, Judge.
17 I'll accept that if you say you did, then you did.

18 THE COURT: Well, I think I did. But let
19 me -- I can pull the order up.

20 MR. MENHART: Your Honor, I know with a lot
21 of confidence that you did, because we pulled it right
22 out of it.

23 THE COURT: Did I cite the Sand and Siffert
24 instructions?

25 MR. MENHART: You cited the instruction in

1 your order.

2 MR. GREENBERG: You cited this as an
3 instruction?

4 THE COURT: I cited the instruction in the
5 opinion. But let -- if you have a question about it,
6 let's find the order. I have the order in my trial
7 notebook and see if I cited it or not.

8 MR. MENHART: Your Honor, we can represent
9 to the Court it's on page 12 of docket number 91.

10 THE COURT: Thank you.

11 Well, for some reason, it won't come up on
12 my copy of it. My trial notebook doesn't have a page
13 12. It doesn't have page 12.

14 MR. GREENBERG: You need page 12?

15 THE COURT: I do. If I could see page 12 it
16 would help me.

17 Yes, I cited Sand and Siffert Model Jury
18 Instruction 65.06. All right, you can give it back.

19 So, here's what I'm going to do.

20 MR. GREENBERG: Can I make two points?

21 THE COURT: Yes, you can.

22 MR. GREENBERG: Firstly, you cited that jury
23 instruction just as far as the second element. So
24 again, I don't know that the Court was considering at
25 that point making it a full jury instruction.

1 I don't disagree if you cited that, that the
2 Sand Model Jury Instruction 65.06 has the first elements
3 that the Court set forward.

4 The other issue -- we did break ours up in
5 just using the statute a hundred percent. So it's no
6 different.

7 But, one of the differences, as the Court
8 noted during our Rule 50 motion is that the arguments
9 and you cited it just from the paragraphs was for the
10 obtaining and looking at the stored communications. But
11 when the Court made the decision for summary judgment,
12 you also included the possibility of altering or
13 preventing access which wasn't part of the complaint.

14 And so, if you do choose over -- if you do
15 choose the defendant's proposed instruction over ours,
16 I'd ask you to at least strike the words that are in
17 addition to what was alleged in the complaint and leave
18 it to only the e-mails that we were -- that they were
19 sued upon.

20 THE COURT: So, you're requesting that I
21 strike out "or altered or prevented access to"?

22 MR. GREENBERG: Yes.

23 THE COURT: But the "prevented access to"
24 would apply if he was locked out of his e-mail because
25 the password had been changed, wouldn't it?

1 MR. GREENBERG: But he didn't allege that in
2 the complaint.

3 THE COURT: He testified that he --

4 MR. GREENBERG: He did testify. I'm just
5 saying he didn't allege it in the complaint. That's
6 very specific. And the Court went over the complaint
7 and found that it was only the e-mails.

8 So, I'm just simply responding that they
9 made a complaint --

10 THE COURT: Hold on, hold on.

11 MR. GREENBERG: All right, okay.

12 THE COURT: I'm going to look at the amended
13 complaint.

14 MR. GREENBERG: Your Honor, I'd just like to
15 cite the Court to the relevant paragraphs. It is
16 paragraphs 86, 87, and 88 and those that follow.

17 THE COURT: Paragraph 42 alleges that Ms.
18 Torrenzano deleted notification e-mails sent by
19 plaintiff's account whenever a new device connects to
20 his account. That might be an alteration.

21 MR. GREENBERG: There is no evidence of
22 that.

23 THE COURT: Your response, Mr. Menhart,
24 concerning alteration or preventing -- prevention

25 MR. MENHART: Sure, our response --

1 THE COURT: -- in the complaint.

2 MR. MENHART: Our response would be
3 that first and foremost, to the extent that there was
4 any type of objection here, it should have been made at
5 trial, because there was quite a bit of testimony
6 related to the changing of the passwords, the alteration
7 of the accounts, et cetera, et cetera. So we think the
8 objection is waived in the first place.

9 The second thing this is literally a -- the
10 jury instruction that's given, there's no question that
11 the complaint clearly sets out a claim under Stored
12 Communications Act. And all this instruction is doing
13 is saying, here's what you have to prove under the
14 Stored Communications Act.

15 And so then what we did was, we went to
16 trial here, and we presented testimony that would be
17 consistent with proving a claim under the Stored
18 Communications Act.

19 So, even -- it's all very consistent and
20 there's no surprises here. And for all those reasons,
21 we think our instruction is appropriate.

22 THE COURT: All right. I'm going to give
23 plaintiff's exhibit -- I mean, plaintiff's instruction H
24 which is Sand and Siffert 65.06.

25 Defendant's nine will be denied.

1 MR. GREENBERG: Your Honor, you're going to
2 amend it or I take it the answer is no?

3 THE COURT: No, I'm not going to amend it.
4 I'm going to refuse it. I'm giving plaintiff's
5 instruction. Thank you.

6 Now, going to P1, and I understand defendant
7 has a number of objections to it, and I think that the
8 way to resolve this is to use the definitions that are
9 in the code and not add any additional verbiage to them,
10 as oppose to number three, electronic communications and
11 the Court can give the full definition of electronic
12 communication and the same for electronic storage. I'm
13 talking about PI. Thank you.

14 MR. GREENBERG: And we also would actually
15 look at -- I think what the defendant offered was
16 separate instructions broken down, beginning at
17 defendant's 11. So for a bit of cross reference --

18 THE COURT: And, the s defendant's 11, is
19 that exact copy of the statute?

20 MR. BRADLEY: Your Honor, I can answer that.
21 We -- we actually had a separate instruction for each
22 definition.

23 THE COURT: My question was with respect to
24 D11, is that a verbatim statement of the definition
25 given in the statute?

1 MR. BRADLEY: Yes, Your Honor. The only
2 changes that were made from the statute, I think when we
3 actually agreed with Mr. Menhart, was we had taken out
4 the language about "electronic communication does not
5 mean" and then I think it listed wire.

6 THE COURT: So, to answer my question, so
7 D11 this is an exact statement of the statute?

8 MR. BRADLEY: Yes.

9 THE COURT: All right. So if I give an
10 exact statement of the statute, then we're all in
11 agreement. Is that right?

12 MR. BRADLEY: Yes.

13 MR. GREENBERG: Yes.

14 THE COURT: So, I'll do that for electronic
15 communication. I'll do that for electronic storage, and
16 as it relates to the state of mind -- let's see here.

17 MR. MENHART: I'm sorry. You said you were
18 going to give D11 and E12?

19 THE COURT: No. Right now, I'm on PI.

20 MR. MENHART: Thank you.

21 THE COURT: And I said I was going to
22 give -- are you asking about the instruction we just
23 did, the earlier one?

24 MR. MENHART: No, I'm looking and I
25 apologize if I'm confused here.

1 THE COURT: That's all right.

2 MR. MENHART: But I'm looking at PI.

3 THE COURT: Which is definitions from the
4 statute.

5 MR. MENHART: Correct.

6 THE COURT: And I'm saying, I'm going to
7 give the statutory definition.

8 MR. MENHART: Right, we agree on that.

9 THE COURT: Okay.

10 MR. MENHART: And the question is are you
11 using the defendant's instructions in place of PI?

12 THE COURT: Yes.

13 MR. MENHART: Okay, thank you.

14 THE COURT: But I'm only doing it to the
15 extent that they conform to the statute. I'm just going
16 to copy the statute.

17 MR. MENHART: And we agree.

18 THE COURT: Now, as it relates to state of
19 mind which is 5 and 6, I guess my question is whether
20 these are statutory definitions or is this verbiage that
21 you've written, Mr. Menhart?

22 MR. MENHART: My representation to you, Your
23 Honor, would be that I cannot remember the specific
24 language that we did other than we have our citations.

25 THE COURT: Okay.

1 MR. MENHART: To the -- and again, this is
2 a -- this is a Fourth Circuit case, and it does site the
3 Sanford. And it cites to the House Report as well. So
4 that is the representation I'm comfortable making right
5 now.

6 THE COURT: Okay. The statute doesn't
7 define willful or intentional. But, they have general
8 meaning in the law. And I can use the general
9 instruction from just a civil knowing intentional state
10 of mind. That might be sufficient under the statute,
11 because the statute says "Any violation of this chapter
12 which the conduct constituting the violation is engaged
13 in with a knowing and intentional state of mind made in
14 a civil action for personal recovery" -- so I could use
15 the statutory language, "knowing or intentional state of
16 mind".

17 MR. MENHART: We don't object to that, Your
18 Honor.

19 THE COURT: Yes.

20 MR. GREENBERG: What I would also ask the
21 Court to consider is if you look at the jury instruction
22 D18, which is willful intentional.

23 THE COURT: D18, hold on.

24 MR. GREENBERG: Yes.

25 THE COURT: Okay.

1 MR. GREENBERG: And, I ask the Court to
2 consider the fact that there may be a different mindset
3 for the violation of the act versus the award of
4 punitive damages.

5 I know the word "knowing" is used in the
6 statute, and I know that the word "willful intention" --
7 the Court would agree that there's a difference there as
8 used for punitive damages purposes.

9 So, I think there has to be two separate
10 instructions to know that they're two different
11 mindsets. You have to have a mindset to violate the act
12 and some aspect of the mindset that would make punitive
13 appropriate.

14 THE COURT: Well, my impression is the
15 statute says if the violation is willful or intentional,
16 the Court may impose punitive damages. So willful and
17 intentional --

18 MR. GREENBERG: Have to be more than
19 knowing.

20 THE COURT: Well, I don't see anything in
21 the statute that creates a higher burden of proof, do
22 you?

23 MR. GREENBERG: Well, I will admit --

24 THE COURT: Those are different words to me,
25 but I don't see -- the burden of proof could either be

1 preponderance of the evidence or clear and convincing.
2 I don't see anything here about burden of proof, do you?

3 MR. GREENBERG: I do not. But let me, if I
4 might -- but I don't understand then. Is if -- if the
5 knowing and willful violation of the statute was all
6 that were required, then I don't know why they have an
7 if clause. They should simply say "then one could award
8 punitive damages". But it goes on to say if you find
9 this, and if you then find that it was willful and
10 intentionally, then you may also award punitive. That
11 suggests a higher burden. Otherwise it wouldn't be an
12 if clause.

13 THE COURT: Well, if Congress intended a
14 higher burden, they would have put it in the statute.
15 So I'm not willing to infer a higher burden --

16 MR. GREENBERG: I think they did by using
17 the word -- I'm sorry, Your Honor. I didn't mean to
18 interrupt you.

19 THE COURT: That's all right. Go ahead.

20 MR. GREENBERG: I think they did by using
21 the word "willfully" and "intentionally" versus
22 "knowingly" and "willfully".

23 I think the word "intentionally", I know we
24 argued this at sidebar, means the knowledge that you're
25 violating the law.

1 Now, just to give the Court -- I know you
2 said ignorance of the law is no excuse, which is usually
3 true --

4 THE COURT: Always true in federal court.

5 MR. GREENBERG: Well, I'll give an example
6 in the structuring statute.

7 THE COURT: No, we don't need to go to
8 structuring statute. Just focus on this case.

9 MR. GREENBERG: I know, but that --

10 THE COURT: Let me finish. Let me finish.

11 One of the question is a reasonable
12 expectation of privacy. So the question is, if you have
13 e-mail that's password protected, is it your view that's
14 public information or is it private? Does the person
15 who holds the account have a reasonable expectation of
16 privacy that only those persons who have been provided
17 the password have access to it?

18 I think it answers itself in the question.
19 So I'm not going to argue with you about it. What I'm
20 going to do is this. My judgment is that the standard
21 of proof is still the preponderance of the evidence. I
22 don't have anything that says otherwise.

23 MR. GREENBERG: I'm not suggesting
24 otherwise, Your Honor. I'm not suggesting about the
25 preponderance of the evidence. I'm talking about the

1 knowing and willful nature.

2 The preponderance of the evidence is defined
3 that you knowingly and willfully committed the act by
4 preponderance of the evidence.

5 And then, it further is you willfully and
6 intentionally violate the act for purposes of then
7 applying punitive damages. It doesn't change
8 preponderance of the evidence.

9 THE COURT: Okay. Two district courts have
10 interpreted willfully and intentionally to mean that the
11 defendant knew her conduct was unlawful. What's your
12 position on that, that she knew her conduct was
13 unlawful?

14 MR. GREENBERG: Your Honor, I'm sorry. I
15 didn't hit the microphone. I didn't hear what you said.

16 THE COURT: Let me say it again. Two
17 district courts have interpreted the words "willful" or
18 "intentional violation" to mean the defendant knew her
19 conduct was unlawful. What is your position on that?

20 MR. GREENBERG: I think it's correct.

21 THE COURT: Okay. Then, I'm going to use
22 the definition that's in the statute for element five of
23 knowing and intentional state of mind. That will be
24 five.

25 And for element six, I'm going to use the

1 language that "willful or intentional violation means
2 that the defendant knew her conduct was unlawful". That
3 will be element six of the definitions on P1 that I will
4 give. And either side doesn't have to agree with that
5 but that's what I'm going to do.

6 And I think you both persist in your
7 objections; is that right? For the record, you both
8 persist in your objections?

9 MR. GREENBERG: Yes.

10 MR. MENHART: Yes, we do.

11 THE COURT: Okay.

12 Now, D11 is just the same about electronic
13 communication service which I think we just addressed by
14 saying we use the statute of the definition of
15 electronic communication.

16 So that would be refused because we already
17 have it, and we're going to use the statute.

18 All right. You with me on D12?

19 MR. MENHART: Yes.

20 THE COURT: Since I'm using the statutory
21 definition, I'm going to give this -- this appears to be
22 the statute that the defendant has cited.

23 Didn't you cite the statute, the full
24 statute?

25 MR. BRADLEY: This is --

1 THE COURT: D12.

2 MR. BRADLEY: For D12, this is not the
3 entire definition. This is actually something that we
4 had discussed. We took it out, because my memory is
5 that at the end of foreign commerce, it says, but
6 electronic communications does not include. And then
7 there was a list of other wire communications, and that
8 don't apply to this case. So we took out the
9 exceptions.

10 THE COURT: All right. Is D12 acceptable to
11 you, Mr. Menhart?

12 MR. MENHART: Yes, we don't have -- we don't
13 have a major objection to that. I think it was
14 primarily objected to because we had our PI. And now
15 that has been resolved, I think we are fine.

16 THE COURT: So, D12 can be given?

17 MR. MENHART: I accepted counsel's
18 representation if that's what happened.

19 THE COURT: Okay.

20 MR. MENHART: I don't have an issue and I
21 don't have a reason to doubt that right now.

22 THE COURT: All right. And so, we don't
23 need the same repeat of it in D14, do we?

24 MR. BRADLEY: Your Honor, electronic
25 communications system and electronic communication

1 service, actually --

2 THE COURT: They are two different things.

3 MR. BRADLEY: They are two definitions, yes.

4 THE COURT: All right. I can give -- unless
5 you have an objection, Mr. Menhart, D14 which appears to
6 be a copy of the statute as well on electronics
7 communications system as opposed to electronic
8 communications, the word system.

9 MR. MENHART: To the extent that's the exact
10 definition of the statute, we don't object.

11 THE COURT: All right. I think it is. But
12 if it's not, those are the words I'm going to use.
13 Unless there's some reason to change it, you should
14 assume I'm going to do that.

15 Now, P, plaintiff's J.

16 Why do we need those sub-elements, Mr.
17 Menhart, 1 and 2?

18 MR. MENHART: These are -- and these again
19 are outside circuits. You know, they're demonstrating
20 what they want to see happen in these instances. So,
21 that's why we put them in.

22 And we think that this -- in addition, it
23 creates a clear line of analysis for the jury to
24 undertake. So, that's why this is our instruction, our
25 proposed instruction.

1 THE COURT: I'm listening.

2 MR. GREENBERG: Your Honor, I'm trying
3 to --- I'm sorry.

4 THE COURT: Take your time, PJ.

5 MR. GREENBERG: I have the PJ, and I have --
6 I'm just trying to see where -- since usually we
7 disagree, we had our own independent instruction. I
8 want to make sure I did that together. I believe that
9 that's D13.

10 Your Honor, I -- this particular -- this
11 particular instruction as I read it is almost -- is
12 almost a directed verdict with subparagraph two in it.
13 Because if I understand this finding instruction, it's
14 not just saying they have to find that the elements, but
15 it looks like it says if you find that he didn't -- that
16 she went into and then he said that he left a copy of an
17 e-mail in his e-mail box, you shall then find that he's
18 established this case.

19 And I don't know -- we during a Rule 50, we
20 argue that wasn't true. And of course we'll leave that
21 to the jury to decide.

22 But, this would be, in my mind, especially,
23 paragraph -- sub two. Number one I don't think matters
24 because there was no information about that. There was
25 no testimony about whether or not the defendant did or

1 didn't open any of his e-mails. So there was zero
2 testimony about that. I don't know why we would put
3 that in there as a finding. I don't know that we need
4 this finding.

5 But we have -- we have, I think, I guess,
6 our simplified version was jury instruction D14.

7 THE COURT: D14 or D13? I think you meant
8 D13, didn't you?

9 MR. GREENBERG: I beg your pardon, Your
10 Honor. I did mean that.

11 THE COURT: And, the statute used the words
12 "for purposes of backup protection of such
13 communications"? Does the statute use those languages?

14 MR. GREENBERG: Yes, it does specifically
15 say that.

16 THE COURT: Okay.

17 MR. MENHART: Our response to that, Your
18 Honor, simply that we are -- we have provided additional
19 background on -- you know, and we have the citations to
20 it. We've provided additional background how other
21 courts have interpreted that. So, you know, that's our
22 position. We understand that this -- I don't think we
23 dispute the definition of electronic storage.

24 THE COURT: All right. I'm going to give
25 D3 -- D13 which appears to be the statute and refuse to

1 give plaintiff's J.

2 The problem with plaintiff's J is that
3 either or judgment and the statute doesn't have such
4 detail. And I understand you're trying to address the
5 case law, and I'm not sure that there was any testimony
6 about plaintiff opening or not opening his own e-mail
7 or -- well, there was testimony that the e-mail --
8 that -- his testimony that his e-mail and his bank
9 statements remained on his e-mail for purposes of
10 background after he paid his bill. He did testify to
11 that.

12 And I think that that's in the facts. I
13 don't think I need to direct the jury to that. So, I'll
14 give D13.

15 PK.

16 MR. GREENBERG: Your Honor, I believe PK is
17 redundant. I believe that the Court's already laid out
18 the elements and what -- what the preponderance of the
19 evidence is.

20 THE COURT: It is a duplicate, isn't it,
21 Mr. Menhart?

22 MR. MENHART: I'm comfortable withdrawing
23 it, Your Honor.

24 THE COURT: Withdrawn.

25 Now, punitive damages, plaintiff's L, like

1 law and D17. All right. I do think that looking at and
2 comparing the two instructions, the plaintiff's
3 instruction which appears to be very similar to the
4 statute and the case law, the defendant's instruction,
5 the first paragraph is unnecessary, it seems to me about
6 whether the Court has determined he has suffered no
7 actual damages.

8 The more detailed instruction on punitive
9 damages from the defendant thereafter does set forth
10 some of the elements that the Court -- the jury is to
11 consider in whether or not to award punitive damages and
12 the amount that they should award and the factors A
13 through F.

14 It appears to be Seventh Circuit pattern
15 instruction modified.

16 Mr. Menhart, should I tell the jury about
17 these ways to evaluate punitive damages and how to set
18 them?

19 MR. MENHART: Your Honor, we believe our
20 position is that the -- both counsel will be able to
21 address the issue of damages during closing arguments.

22 The jury has the ability to come to their
23 own conclusions as to what damages are appropriate.
24 And, the plaintiff's jury instruction L very clearly
25 cites to the statute and cites to good law and Fourth

1 Circuit which is the *Van Heusen* case.

2 So we believe -- and, in addition to those
3 points, we do think that there's a concern that using
4 Seventh Circuit pattern jury instructions with a Fourth
5 Circuit case does create a potential conflict.

6 So, because we cite the statute and we cite
7 the Fourth Circuit case, we believe that's more
8 appropriate.

9 THE COURT: All right. Well, I appreciate
10 that. I'm going to give the first paragraph of
11 plaintiff's L, take out the first paragraph of
12 defendant's 17 and give the reminder of defendant's 17
13 because the elements A through F are the elements the
14 Court -- the jury's to consider to determine whether to
15 award punitive damages so that the Court can assess how
16 the punitive damages was made under the *BMW* case of the
17 United States.

18 I'm talking about the *BMW* case, because you
19 can't just have an award of punitive damages that
20 doesn't take into account the factors of A through F.

21 Now, the next I have is plaintiff's M like
22 man and defendant's 18. I don't see any basis to use a
23 Veterans Administration case for punitive damages, and I
24 don't see any reason to add another instruction on
25 punitive damages from plaintiff's M if I'm giving the

1 one I've just described.

2 So, my plan is to refuse plaintiff's M and
3 defendant's 18, refuse them both.

4 It appears the defendant's 1, which has to
5 do with exhibit being admitted for limited purpose, the
6 plaintiff had an objection to it, but I'm not sure I
7 know what the objection is.

8 MR. MENHART: I guess our position is that I
9 don't think anything was -- I don't think anything was
10 admitted for a limited purpose, as I remember. We had
11 one that was --

12 THE COURT: Well, the impeachment evidence,
13 because it was a party would be admissible. So you're
14 saying there's no evidence that qualifies.

15 What you do think, Mr. Greenberg?

16 MR. GREENBERG: I'm sorry. I was looking
17 over the instruction nine and made a record, number 18,
18 you already addressed and the previous one --

19 THE COURT: Right.

20 MR. GREENBERG: -- I wasn't caught up, and I
21 beg your pardon.

22 THE COURT: Take your time and look at
23 number defendant's 1.

24 MR. GREENBERG: Defendant's 1.

25 THE COURT: The question is whether anything

1 was admitted for a limited purpose. I'm not sure
2 anything was.

3 MR. GREENBERG: Your Honor, I think it's not
4 necessary to have defendant's 1.

5 THE COURT: All right. Well, we'll withdraw
6 defendant's 1 -- refuse defendant's 1 since you offered
7 it.

8 And, defendant's 2, I think we already have
9 that in the credibility of the witness instruction.
10 Plaintiff's A, I think, the same thing. But you can
11 take a look at it, defendant's 2. It appears to be
12 duplicate of plaintiff's A about credibility of
13 witnesses to me.

14 MR. BRADLEY: Your Honor, my memory of this
15 was that plaintiff's A was a preliminary instruction
16 that the Court might have given some of it --

17 THE COURT: Is there a credibility of
18 witnesses instruction here?

19 MR. BRADLEY: Not a separate one. I
20 think --

21 THE COURT: Not a separate one?

22 MR. BRADLEY: No, I think it was part of
23 plaintiff's A, but plaintiff's A also had some
24 preliminary instructions in it.

25 THE COURT: All right. Well, we should use

1 plaintiff's A, the extra for plaintiff's A that talks
2 about credibility of witnesses. I think that might be
3 the way to do it. But we don't need additional
4 instruction. This will be the instruction on the
5 credibility of witnesses unless you all see something
6 else.

7 MR. MENHART: Your Honor, I would just point
8 out to the Court that it looks like J5, jury instruction
9 J5 has the credibility of witness.

10 Do you guys disagree with me?

11 THE COURT: No, J5 is credibility of the
12 witnesses.

13 So, we have it here, don't we?

14 MR. GREENBERG: Yes, sir. Is that the joint
15 agreed one?

16 MR. MENHART: It was joint.

17 THE COURT: It's a joint instruction, okay.
18 So we'll give J5 and refuse defendant's 2.

19 Defendant's 4 is a preponderance of the
20 evidence which I think we've already talked about.
21 Didn't we do that already?

22 MR. BRADLEY: Yes.

23 THE COURT: All right. So, we'll refuse
24 defendant's 4. We talked about burden of proof,
25 preponderance of the evidence.

1 Clear and convincing evidence is not a part
2 of the statute.

3 And, defendant's 5 appears to be again a
4 duplicate of plaintiff's A, about two types of evidence.
5 Is that right? Let's take a look at defendant's 5.
6 Yeah, defendant's 5 and plaintiff's A. They're not
7 exactly the same.

8 MR. MENHART: Your Honor, I guess for
9 purposes of just -- we wouldn't object to it being
10 admitted.

11 THE COURT: All right. We'll give
12 defendant's -- defendant's 7. I don't think we need
13 defendant's 7. The fact that the lawsuit was filed,
14 there's still a burden of proof that they have to meet.
15 The fact that the lawsuit was filed doesn't prove
16 anything. You want defendant's 7?

17 MR. GREENBERG: Your Honor, Court's
18 indulgence one moment, please.

19 Your Honor, I would like defendant's 7.

20 THE COURT: All right. Objection to seven?

21 MR. MENHART: Your Honor, our objection is
22 exactly what the Court just stated which is that there
23 is a clear demonstration of the requirements or to
24 prevail at trial. And that instruction was comfortably
25 already given. We would strike it because it's

1 duplicative.

2 THE COURT: All right. I'm going to give
3 defendant's 7. I'll give it.

4 Defendant's 8.

5 MR. GREENBERG: Your Honor, if I might.

6 THE COURT: Yes.

7 MR. GREENBERG: What happened is, this is
8 where I'm confused. So initially, Mr. Menhart proposed
9 general preliminary instructions which he gave -- the
10 Court would give to the jury before they sat down at the
11 beginning of the trial.

12 We gave instructions because, Your Honor, in
13 our -- any way, it would be instructed at the close of
14 the trial at the close of evidence like they are now.
15 So when you're going back and forth, so that's why we
16 stopped looking at A.

17 And then, when Mr. Hines came out, we agreed
18 that those were no longer relevant in a way because they
19 were moot, because the preliminary instructions were
20 whatever the Court gave. And now, we have the closing
21 instructions.

22 We're going back and forth. I don't know
23 that there would be a disagreement as long as -- my
24 instructions were credibility of witnesses,
25 circumstantial evidence, you know, what is or isn't

1 evidence, like that.

2 So, that's what we're doing. We're giving
3 the same instruction basically because they were post
4 close of trial.

5 THE COURT: All right. Do you persist in
6 your objection to defendant's 8?

7 MR. MENHART: We just think it's primarily
8 duplicative, but we're not going to object to it.

9 THE COURT: All right. I'll give
10 defendant's 8.

11 Defendant's 9, let me go back to plaintiff's
12 H here. We've already dealt with this, I think.

13 MR. GREENBERG: You have, Your Honor.

14 THE COURT: So, we don't need to give --
15 defendant's 10 will be refused.

16 I think defendant's 11 we've already
17 covered.

18 MR. GREENBERG: What did you do with
19 defendant's 10?

20 THE COURT: I'm sorry.

21 MR. GREENBERG: Defendant's 10?

22 THE COURT: Defendant 10 will be refused.

23 MR. GREENBERG: Refused?

24 THE COURT: Yes, we've already covered about
25 elements of the Electronic Stored Communications Act.

1 MR. GREENBERG: Your Honor, I think you've
2 already gone through 11 and 12, I believe.

3 THE COURT: If you persist with 10, tell me
4 what your reasoning is.

5 MR. GREENBERG: Well, Your Honor, it sets
6 down -- it sets forth the law and the burden's on the
7 plaintiff and not on the defendant. It basically says
8 if you find electronic communication was not stored for
9 backup protection, then you should basically find the
10 defendant is not liable.

11 And just directly, it tells the jury that
12 that's one of the elements and what they're supposed to
13 do depending upon the finding.

14 Sorry, I should stand.

15 THE COURT: All right. I think I've
16 addressed this issue before and I'll say it again. I
17 don't -- I may address it post trial, if necessary, but
18 this is an open question about whether electronic
19 communication stored on an remote e-mail server falls
20 within the purview of the act.

21 And my judgment for right now is that I'm
22 just going to leave it with the statutory words, backup
23 protection, and not make any particular judgment right
24 now because I know there's a circuit conflict on this
25 question, and it's a factual question.

1 So, 10 is refused. 11 -- D11, objection to
2 D11?

3 MR. GREENBERG: Your Honor, I think you may
4 have gone over these. These are the elements --

5 THE COURT: Oh, that's the elements 11, 12,
6 13. So, we've covered all these. So these will be
7 refused. We've already covered them.

8 MR. GREENBERG: You may have accepted some
9 of them.

10 THE COURT: Well, I mean we're using the
11 statutory words. That's what I agreed to earlier. So,
12 if the -- if these conform to the statute, I'll use
13 them. If they don't, I won't. Hopefully that makes
14 sense.

15 MR. GREENBERG: The only thing we modified
16 on 13 you can use the exact statutory words. It doesn't
17 include certain signals that --

18 THE REPORTER: I'm sorry.

19 THE COURT: You can come to the podium, too.
20 It might make it helpful.

21 MR. GREENBERG: We modified one of the -- we
22 modified -- the parties jointly modified one of the
23 definitions to redact information that's just not
24 relevant to the case, for example.

25 THE COURT: Altered or prevented --

1 MR. GREENBERG: No, it wasn't that part. It
2 was what kind of signals. It indicates what kind of
3 signals and stored communication, but it is --

4 THE COURT: I see.

5 MR. GREENBERG: -- it doesn't include like a
6 pager or tone and they have four of them. It's just
7 completely irrelevant to our proceedings.

8 In fact, it was the plaintiff that asked
9 that we would redact it and we agreed. So, just FYI.

10 THE COURT: So, you should use D13, is that
11 what you're saying? You all agreed to D13?

12 MR. BRADLEY: Yes.

13 MR. GREENBERG: Yes, yes, that's correct.

14 THE COURT: All right, D13 will be given.

15 D14 I believe is the same; is that right, to
16 give 14?

17 MR. GREENBERG: Yes, it's a statement of the
18 statute.

19 THE COURT: Well, do we even need D15 now?

20 MR. GREENBERG: Your Honor, I would submit
21 that we do. D15 is a question of whether or not there's
22 conspiracy liability.

23 So that if independently, if they were to
24 decide that Dr. Watts was on the -- was the one who was
25 accessing the e-mail, that is not Nicole Torrenzano's

1 responsibility. She is only liable in a civil setting
2 under this statute for her own conduct.

3 And so I think if they conflated it at
4 times, I would like the jury to be clear that what they
5 have to decide is whether she violated the act. And her
6 violation would be her access, nothing else.

7 THE COURT: Mr. Menhart.

8 MR. MENHART: Your Honor, our position on
9 this one is that it's prejudicial. It effectively is
10 making an argument in the jury instruction that she
11 didn't access on -- in the October time period.

12 Furthermore, there is no cited jury
13 instruction whatsoever. And, the question is the
14 secondary liability really isn't part of the jury at
15 all. There is no allegation of secondary liability
16 against Ms. Torrenzano.

17 THE COURT: All right. I'm going to sustain
18 the objection to defendant's 15. There's actually not a
19 conspiracy claim left. So -- and there's no evidence
20 about what Dr. Watts did or did not do other than
21 plaintiff's testimony.

22 Looking at defendant's 17, I think we've
23 already talked about punitive damages in defendant's 17.
24 I refused defendant's 18 earlier.

25 MR. GREENBERG: You noted our objection on

1 17, the fact that we believe that we should be -- the
2 jury should be informed you made the finding there was
3 no award of actual damages.

4 And the reason that we would submit that
5 that's an important part of the punitive damages is
6 because there is substantial case law that indicates
7 that one, that the jury should decide the issue of
8 punitives based on the amount of actual damages. And so
9 if there's zero, they should know that.

10 THE COURT: Thank you for saying that, but
11 I'm not going to do it because the Fourth Circuit has
12 said a person can recover under the act for punitive
13 damages without actual damages, which would suggest to
14 me it's not necessary to have actual damages.

15 MR. GREENBERG: Your Honor, I agree with
16 that. And if I misspoke what I meant to say is that I
17 agree that that's the law. But then when deciding what
18 to award in punitive damages, one of the factors are to
19 look at what the actual damages were.

20 So they might decide with zero actual
21 damages, a thousand in punitives. If the real actual
22 damage were a hundred thousand, then 200,000. But
23 there's a correlation --

24 THE COURT: Would you show me in part of 17
25 a list of factors A through F. I don't see the amount

1 of compensatory damages, do you?

2 MR. GREENBERG: Excuse me one second.

3 Your Honor, F --

4 THE COURT: It says actual harm.

5 MR. GREENBERG: That's right. Well, actual
6 damages. Maybe harm was the wrong word.

7 THE COURT: Well, I'm not going to give
8 defendant's -- I've already told you I'm going to give
9 the punitive damages instruction, so 17 will be refused
10 for the reasons I stated earlier.

11 And 19, let's look at 19.

12 MR. GREENBERG: You've actually given 17.

13 THE COURT: I'm giving parts of 17, but I'm
14 not giving the part about -- I've determined that he had
15 no damages. I'm not doing that.

16 And 19 is -- we've already covered that on
17 Fifth Amendment. So that's refused.

18 I believe I've now covered all the
19 instructions.

20 MR. GREENBERG: I don't think you refused
21 that. I think you were granting defendant's.

22 THE COURT: Well, I've granted -- am I
23 granting this one or a different one? I thought I was
24 granting --

25 MR. GREENBERG: You said 19.

1 THE COURT: I'm granting 19, sorry.

2 I believe I've covered all the instructions
3 now, have I?

4 MR. GREENBERG: You have. Your Honor, would
5 it be inappropriate to go through a list, so write down
6 and make sure I have them right.

7 THE COURT: You can certainly do that with
8 my law clerk.

9 What I'm going to do is have my law clerk
10 now start crashing the board and putting the
11 instructions together so we can all look them over and
12 organize them. We may or may not be able get to the
13 jury today. It depends on how long it takes to get them
14 organized.

15 So, what I'll do is take a recess. Let --
16 weren't you all taking notes while we were going through
17 this right now?

18 MR. GREENBERG: I was, but when you said 19
19 was not, I wanted to make sure I get it right, too.

20 THE COURT: What I'm going to do is I'm
21 going to put them together for you, and you can look
22 them over. Okay. But I'm not going to spend the time
23 now to have you --

24 MR. GREENBERG: Sure enough.

25 THE COURT: -- take notes. I mean, you have

1 two lawyers there, and --

2 MR. GREENBERG: Yes, sir, I understand.

3 THE COURT: Okay. All right. So, we'll
4 recess until we have the draft instructions available,
5 and we will come back with a draft for you soon.

6 I'll let the law clerk bring it out so you
7 all can look them over. And if there are any objections
8 that remain, we will come back. I think it's going to
9 take at least 45 minutes, if not longer.

10 MR. GREENBERG: Like to eat or --

11 THE COURT: Exactly, exactly. So it's 2:08
12 now. Let's come back at 3:15. Does that sound --
13 that's almost an hour. All right. Thank you.

14 (Court recessed at 2:08 p.m. and reconvened
15 at 3:38 p.m.)

16 THE COURT: Counsel, you've had a chance to
17 review the instructions?

18 MR. MENHART: Yes, sir.

19 MR. GREENBERG: Yes, Your Honor.

20 THE COURT: And everything's resolved?

21 MR. GREENBERG: I think so.

22 THE COURT: All right. I think I can read
23 the instructions now, and each of you might end up with
24 about 30 minutes for argument. Would that be
25 sufficient?

1 MR. MENHART: Your Honor, for plaintiff, we
2 can certainly try to be as quick as we possibly can.

3 THE COURT: I'm not trying to rush you. How
4 much time do you think you need?

5 MR. MENHART: We're concerned -- we're
6 concerned that it might be close. We would do the very
7 best we could. I guess I would say to the Court, I
8 think it's probably going to be 15 to 20 minutes.

9 THE COURT: All you need is 15 to
10 20 minutes?

11 MR. MENHART: Right, but you're saying
12 30 minutes total between us or just for us?

13 THE COURT: I was saying 30 minutes each
14 side. Does that work?

15 MR. GREENBERG: I agree.

16 THE COURT: I think I can read the
17 instructions now in less than 20 minutes, hopefully, and
18 then you all would have the case.

19 Now, that means 30 minutes total for
20 plaintiff, not 30 plus 10. You understand?

21 MR. MENHART: We understand.

22 MR. GREENBERG: Would they return at all
23 today or would you release them to come back tomorrow
24 morning?

25 THE COURT: Come back tomorrow. I don't

1 make them stay pass 5 o'clock. I told them I'd stop at
2 5, and I stop at 5.

3 Mr. Hendrick, I need you to bring the podium
4 out so they can face the jury for closing argument.

5 MR. HENDRICK: Yes, sir.

6 MR. MENHART: Your Honor, could I raise one
7 issue. Mr. Robinson has an appearance tomorrow in
8 Arlington Circuit Court.

9 THE COURT: He doesn't need to be here for
10 deliberations. That's fine. You can be excused.

11 MR. MENHART: We appreciate that. Thank
12 you.

13 THE COURT: All set?

14 You can bring our jury out, Mr. Hendrick.

15 MR. HENDRICK: Yes, sir.

16 THE COURT: You may be seated. Thank you
17 for your patience, ladies and gentlemen.

18 You've heard all the evidence you're going
19 to hear in connection with the case. And now it's my
20 duty to instruct you on the law which will govern your
21 deliberations.

22 I will read the instructions to you, and
23 you'll be provided with a written copy of the
24 instructions along with all the exhibits that have been
25 admitted into evidence for your consideration.

1 Members of the jury, it is my duty and
2 responsibility to instruct you on the law you are to
3 apply to this case.

4 The law contained in these instructions are
5 the only law you may follow. It is your duty to follow
6 what I instruct you the law is, regardless of any
7 opinion you might have as to what the law ought to be.

8 If I've given you the impression during the
9 trial that I favor either party, you must disregard that
10 impression. If I've given you the impression during the
11 trial that I have an opinion about the facts of this
12 case, you must disregard that impression.

13 You are the sole judges of the facts of this
14 case. Other than my instructions to you on the law, you
15 should disregard anything I may have said or done in
16 arriving at your verdict, except for any instructions or
17 ruling I may have made.

18 You should consider all the instructions
19 about the law as a whole and regard each instruction in
20 light of the others without isolating a particular
21 statement or paragraph.

22 The testimony of the witnesses and other
23 exhibits introduced by the parties constitute evidence.
24 The statements of the lawyers are not evidence. They're
25 only arguments.

1 It is important for you to distinguish
2 between the arguments of the lawyers and the evidence on
3 which those arguments rest. What the lawyers say or do
4 is not evidence. You may, however, consider the
5 arguments the lawyers make in light of the evidence that
6 has been admitted and determine whether the evidence
7 admitted during this trial supports the legal arguments.

8 You must determine the facts from all the
9 testimony you've heard and the other evidence as
10 submitted. You are the judges of the facts. But in
11 finding those facts, you must apply the law as I
12 instruct you.

13 You are required by law to decide the case
14 in a fair, impartial and unbiased manner based entirely
15 on the law and on the evidence presented to you in the
16 courtroom.

17 You may not be influenced by passion,
18 prejudice or sympathy you might have for the plaintiff
19 or the defendant in arriving at your verdict.

20 It is my duty to instruct you on the rules
21 of law you must use in deciding this case. When I
22 finish reading these to you, you will go to the jury
23 room to begin your deliberations and discussions of the
24 case.

25 Your decision must be based only on the

1 evidence presented here. You must not be influenced in
2 any way by either sympathy for or prejudice against
3 anyone. You must follow the law as I explain it, even
4 if you do not agree with the law, and you must follow
5 all of my instructions as a whole. You must not single
6 out or disregard any instructions on the law.

7 In this case, it is the responsibility of
8 the plaintiff, Mr. Patrick Hatelly, to prove every
9 essential part of his claim by a preponderance of the
10 evidence. This is sometimes called the burden of proof
11 or the burden of persuasion.

12 A preponderance of the evidence simply means
13 an amount of evidence that is enough to persuade you
14 that plaintiff's claim is more likely true than not
15 true. If the proof fails to establish any essential
16 part of a claim or contention by a preponderance of the
17 evidence, you should find against the plaintiff.

18 In deciding whether any fact has been proved
19 by the preponderance of the evidence, you may consider
20 the testimony of all the witnesses, regardless of who
21 may have called them, all the exhibits received in
22 evidence, regardless of who may have produced them.

23 If the proof fails to establish any
24 essential part of the plaintiff's claim by a
25 preponderance of the evidence, you should find for the

1 defendant, Ms. Nicole Torrenzano, as to that claim.

2 The plaintiff has the burden of proving this
3 case by what's called a preponderance of the evidence.
4 This means the plaintiff must prove that in light of all
5 the evidence what he claims is more likely true than not
6 true.

7 So, if you could put these -- the evidence
8 favoring the plaintiff and the evidence favoring the
9 defendant on opposite sides of balancing scales,
10 plaintiff needs to make the scales tip to his side.

11 To decide whether any fact has been proved
12 by a preponderance of the evidence, you may, unless I
13 instruct you otherwise, consider all the testimony of
14 the witnesses, regardless of who may have called them
15 and all the exhibits that the Court allowed, regardless
16 of who may have produced them.

17 After considering all the evidence, if you
18 decide by -- if you decide a claim or fact is more
19 likely true than not, then the claim or fact has been
20 proved by a preponderance of the evidence.

21 In order to prove that the defendant,
22 Ms. Nicole Torrenzano, committed a violation of 18 U.S.
23 Code 2701(a) of the Stored Communications Act, the
24 plaintiff, Mr. Hatley, must prove three essential
25 elements which are, one, plaintiff must prove that

1 without authorization, the defendant, Ms. Nicole
2 Torrenzano, accessed a system through which electronic
3 communication service is provided or accessed a system
4 through which electronic communication service is
5 provided with authorization but exceeded that authority
6 in accessing the information in question.

7 Two, second, the plaintiff, Mr. Hately, must
8 prove that the defendant, Ms. Nicole Torrenzano,
9 obtained or altered or prevented access to a wire or
10 electronic communication while it was in electronic
11 storage in such system.

12 And third, the plaintiff, Mr. Hately, must
13 prove that defendant, Nicole Torrenzano, acted with a
14 knowing or an intentional state of mind.

15 The term electronic storages means, A, any
16 temporary, intermediate storage of a wire or electronic
17 communication incidental to the electronic transmission
18 thereof, and B, any -- let me start over.

19 B, any storage of such communication by an
20 electronic communication service for the purposes of
21 backup protection of such communication.

22 Electronic storage means storage of
23 electronic communication by an electronic communication
24 service for the purposes of backup protection of such
25 communication.

1 A person acts with an intentional state of
2 mind as to her conduct or the result of her conduct if
3 such conduct or result is her conscious objective.

4 A common means to describe conduct as
5 intentional or to say that one causes the result
6 knowingly or intentionally is to say that it is done or
7 accomplished on purpose.

8 The term intentional is not meant to connote
9 the existence of a motive. The term intentional state
10 of mind does not require that the actor understand the
11 legal significance of her conduct or that the act have a
12 specific intent to violate the law.

13 A person acts knowingly as to her conduct if
14 she was aware of the nature of the conduct, aware of or
15 possessing a firm belief in the existence of the
16 requisite circumstances, and awareness of or a firm
17 belief about the substantial certainty of the result.

18 Electronic communications service means any
19 service which provides to users thereof the ability to
20 send or receive electronic communications.

21 Electronic communications means any transfer
22 of signs, signals, writings, images, sounds, data, or
23 intelligence of any nature, transmitted in whole or in
24 part by a wire, radio, electromagnetic, photoelectronic,
25 photooptical system that affects interstate or foreign

1 commerce.

2 Electronic communication system means any
3 wire, radio, electromagnetic, photooptical or
4 photoelectronic facilities for the transmission of wire
5 or electronic communications and any computer facilities
6 or related electronic equipment for the electronic
7 storage of such communications.

8 When I say -- when I say you must consider
9 all the evidence, I don't mean you must accept all the
10 evidence as true or accurate. You should decide whether
11 you believe what each witness had to say and how
12 important that testimony was.

13 In making that decision, you may believe or
14 disbelieve any witness in whole or in part.

15 The number of witnesses testifying
16 concerning a particular point doesn't necessarily
17 matter.

18 To decide whether you believe any witness, I
19 suggest you ask yourself a few questions. Did the
20 witness impress you as one who was telling the truth?
21 Did the witness have any particular reason not to tell
22 the truth? Did the witness have a personal interest in
23 the outcome of the case? Did the witness seem to have a
24 good memory? Did the witness have the opportunity and
25 ability to accurately observe the things about which he

1 or she testified? Did the witness appear to understand
2 the questions clearly and answer them directly? Did the
3 witness's testimony differ from the other testimony of
4 the witnesses of other -- did the witness's testimony
5 differ from other testimony or other evidence?

6 Certain things are not to be considered as
7 evidence. I will list them for you.

8 First, if I told you to disregard any
9 testimony or exhibits or struck any testimony or
10 exhibits from the record, such testimony or exhibits are
11 not evidence and must not be considered.

12 Second, anything you might have seen or
13 heard outside of the courtroom is not evidence and must
14 be entirely disregarded.

15 Third, questions and objections or comments
16 by the lawyers are not evidence.

17 Lawyers have a duty to object when they
18 believe a question is improper. You should not be
19 influenced by any objection and you should not infer
20 from my rulings that I have any view as to how you
21 should decide the case.

22 Fourth, the lawyers' opening statements and
23 closing arguments are not evidence.

24 Their purpose is to discuss the issues and
25 the evidence. If the evidence as you remember it

1 differs from what the lawyers said, your memory is what
2 counts.

3 You should also ask yourself whether there
4 was evidence that a witness testified falsely about an
5 important fact. And ask whether there was evidence that
6 at some other time, a witness said or did something or
7 didn't say or do something that was different from the
8 testimony the witness gave during this trial.

9 But, keep in mind that a simple mistake
10 doesn't mean the witness wasn't telling the truth as he
11 or she remembers it. People naturally tend to forget
12 some things or remember them inaccurately. So if a
13 witness misstated something, you must decide whether it
14 was because of innocent lapse in memory or an
15 intentional deception. The significance of your
16 decision may depend upon whether the misstatement is
17 about an important fact or non-important detail.

18 The evidence you are to consider consists of
19 the testimony of the witnesses, the documents and other
20 exhibits admitted into evidence and any fair inferences
21 and reasonable conclusions you can draw from the facts
22 and circumstances that have been proven.

23 Generally speaking there are two types of
24 evidence. One is direct evidence, such as the testimony
25 of an eyewitness. The other is indirect or

1 circumstantial evidence. Circumstantial evidence is
2 evidence that proves a fact from which you can logically
3 conclude another fact exists.

4 As a general rule, the law makes no
5 distinction between direct and circumstantial evidence.
6 It simply requires you to find the facts from the
7 preponderance of all the evidence, both direct and
8 circumstantial.

9 A deposition is a witness's sworn testimony
10 that is taken before trial. During the deposition, a
11 witness is under oath and swears to tell the truth and
12 the lawyers for each party may ask questions. A court
13 reporter is present and records the questions and
14 answers.

15 Deposition testimony is entitled to the same
16 consideration as live testimony. And you must judge it
17 in the same way as if the witness was testifying in
18 court.

19 In the event that a person declines to
20 answer a question based upon the Fifth Amendment to the
21 Constitution privilege, you may infer that that person's
22 answer to that question would have incriminated him or
23 her. You're not required to draw this inference.

24 The Fifth Amendment privilege not to testify
25 is not only a privilege for those who are guilt, but it

1 serves to protect the innocence who may be ensnared in
2 ambiguous circumstances.

3 The fact that a person brought a lawsuit and
4 is in court seeking damages creates no inference that
5 the person is entitled to a judgment. Anyone may make a
6 claim and file a lawsuit. The act of making a claim in
7 a lawsuit by itself does not in any way tend to
8 establish the claim and it is not evidence.

9 If you find any violation of the Stored
10 Communications Act by the defendant, Nicole Torrenzano,
11 was willful or intentional, then you may award punitive
12 damages.

13 The purposes of punitive damages is to
14 punish a defendant for her wrongful conduct and to deter
15 similar misconduct by the defendant and others in the
16 future.

17 If however you find in favor of the
18 plaintiff and you find the defendant willfully or
19 intentionally violated the Stored Communications Act,
20 you may, but are not required, to award punitive damages
21 against the defendant, Ms. Torrenzano.

22 The plaintiff, Mr. Hatley, has the burden of
23 proving that punitive damages should be awarded. The
24 fact that I'm giving you this instruction does not mean
25 you must award punitive damages or that I have any

1 opinion about whether the defendant, Ms. Torrenzano,
2 violated the Stored Communications Act or that I have an
3 opinion of whether you should award punitive damages.
4 This decision is up to your discretion.

5 In determining if plaintiff has proved that
6 punitive damages are appropriate, you should consider
7 the following. The purpose of punitive damages is to
8 punish and deter, not to compensate the plaintiff.

9 Punitive damages serve to punish a defendant
10 for willful or intentional conduct, and by doing so, to
11 deter others from engaging in similar conduct in the
12 future.

13 You're not required to award punitive
14 damages. If you find that punitive damages are
15 appropriate, then you must use sound reason in setting
16 the amount of those damages, and your decision should
17 not reflect bias, prejudice or sympathy toward either
18 party.

19 In determining the amount, if any, of
20 punitive damages, you should consider the following
21 factors: A, the reprehensibility of the defendant's
22 conduct; B, the impact of the defendant's conduct on the
23 plaintiff; C, the relationship between the plaintiff and
24 the defendant; D, the likelihood that the defendant
25 would repeat the conduct if an award of punitive damages

1 is not made; E, the defendant's financial circumstances
2 and F, the relationship of any award of punitive damages
3 to the amount of the actual harm the plaintiff suffered.

4 If you decide for the defendant, Ms. Nicole
5 Torrenzano, on the question of liability, then you
6 should not consider the question of damages.

7 Of course, the fact that I've given you
8 instructions concerning the issue of punitive damages
9 should not be interpreted in any way as an indication
10 that I believe plaintiff should or should not prevail in
11 this case.

12 Your verdict must be unanimous. In other
13 words, you must all agree to it. Your deliberations are
14 secret and you'll never have to explain your verdict to
15 anyone. Each of you must decide the case for yourself,
16 but only after fully considering the evidence with your
17 fellow jurors.

18 So, you must discuss the case with one other
19 and try to reach an agreement. While you're discussing
20 the case, do not hesitate to reexamine your own opinion
21 and change your mind if you become convinced that you're
22 wrong. But don't give up your honest belief just
23 because others think differently or because you simply
24 want to get the case over with.

25 Remember that in a very real way, you're

1 judges, judges of the facts. Your only interest is to
2 seek the truth from the evidence in the case.

3 When you get to the jury room, the first act
4 of business should be to choose one of your members to
5 act as your foreperson. The foreperson will direct your
6 deliberations and speak for you here in court.

7 You'll receive a verdict form that have
8 questions you have to answer. Take the verdict form
9 with you to the jury room. When you've all agreed on
10 the verdict, your foreperson must fill in the form, sign
11 it and date it. Then you return it to the courtroom.

12 If you wish to communicate with the judge at
13 any time, any member of the jury panel or the jury
14 foreperson can write down your message or question and
15 give it to the court security officer. The court
16 security officer will then bring it to me, and I'll
17 respond as promptly as I can either in writing or
18 bringing you back to the courtroom.

19 Please understand that I may have to talk to
20 the lawyers and parties before I respond to your
21 question. So you should be patient to -- as you await
22 my response.

23 But I caution you not to tell me or anyone
24 how many jurors voted one way or the other at that time.
25 That type of information remains in the jury room and

1 should not be shared with anyone, including me, in your
2 note or question.

3 You'll now note from the oath about to be
4 taken by the court security officer that he, too, is
5 forbidden to discuss the case with you in any way.

6 Mr. Hendrick, if you would take the oath,
7 please.

8 MR. HENDRICK: Yes, sir.

9 THE COURT: Do you swear or affirm you'll
10 keep this jury -- oh, you have it?

11 THE CLERK: You shall keep this jury
12 together and not have any communications with them
13 yourself not permit any other person to converse or have
14 any communication with them touching this trial and
15 causing them to appear in court.

16 MR. HENDRICK: I shall.

17 THE CLERK: Thank you.

18 THE COURT: Just one second.

19 Mr. Hines, do you have something you want me
20 to see?

21 MR. HINES: Yes, Your Honor.

22 THE COURT: Can you hand it to me?

23 MR. HINES: I can. I need to copy -- I
24 can't hand it to you this second. It's electronic.

25 THE COURT: Okay.

1 Ladies and gentlemen, if you'd step out for
2 just a moment, please.

3 (Jury excused.)

4 THE COURT: So, apparently, the instructions
5 don't have a definition of willful or intentional.

6 Do you have one?

7 MR. HINES: Yes.

8 THE COURT: Can you get it for me?

9 MR. HINES: Yes.

10 THE COURT: You all can have a seat.

11 Okay, I see it. Let's write this down so we
12 will have that as the instruction.

13 Willful -- I'm giving it to you all now,
14 counsel -- or intentional -- let me know when you've
15 written that down.

16 The words willful or intentional -- I want
17 you to write this down what I'm telling you now.

18 MR. GREENBERG: It's willful (inaudible).

19 THE REPORTER: I'm sorry. I can't hear you.

20 THE COURT: Where are you referring to?
21 What page are you referring to? What instruction are
22 you referring to?

23 MR. GREENBERG: You had that on your
24 instruction, part 15, I'm guessing is when he took the
25 changes. He said that must have been deleted that by

1 accident. So, I saw that one issued from the Court.

2 THE COURT: Hand it to me. I don't have it.
3 I don't have it in front of me. He must have left it
4 out. So, let me see. Is that it?

5 MR. HINES: That's it.

6 MR. GREENBERG: We did receive that, Your
7 Honor.

8 THE COURT: Okay. All right. Is that it?
9 To read willful intentional. That's all we need to do?

10 MR. GREENBERG: That's what you had
11 proposed. If you want to do more than that, that's fine
12 with me.

13 THE COURT: Okay. We can bring the jury
14 back then, Mr. Hendrick.

15 MR. HENDRICK: Yes, sir.

16 MR. GREENBERG: It has to do with the
17 computer damages. Just leave it open up.

18 THE COURT: Well, they would get the written
19 instructions. It will be where it belongs.

20 You may be seated.

21 Additionally, ladies and gentlemen, the
22 words willful or intentional means that the defendant,
23 Ms. Nicole Torrenzano, knew her conduct was unlawful.

24 I've given both sides about 30 minutes for
25 argument. I think what we will come close to stopping

1 right at 5 o'clock.

2 Let me have plaintiff's counsel go first.

3 And are you doing all 30 or is it 20 and 10? What are
4 you doing?

5 MR. MENHART: Well, I don't want to make any
6 promises. I think it will be less than 30.

7 THE COURT: All right. But, in other words,
8 you don't want rebuttal?

9 MR. MENHART: As far as -- yes, let me
10 reserve five minutes for rebuttal.

11 THE COURT: Okay. The clerk will keep track
12 of time, and you'll have to knowledge her when she shows
13 you the time cards.

14 MR. MENHART: Good afternoon. The one
15 negative to closing arguments is that things change
16 during the course of the day and so the computer is here
17 now compared to when I first talked to you the other
18 day.

19 So, what we're going to talk about here is
20 couple different things. First we're talking about what
21 we saw and we actually have a little bit of evidence on
22 the screen, and then we're going to talk about damages.
23 So those two separate sections we're going to talk
24 about, and I suspect counsel will do the same thing.

25 So the first thing I want to talk about,

1 what did we see here the last couple days? We've seen
2 first from the defendant, Ms. Torrenzano. You saw her.
3 She did take the stand. We saw in our humble opinion a
4 lot of the inconsistent testimony. She had a deposition
5 about two months ago. She pled the Fifth as to many
6 meaningful things. And she pled the Fifth as to her
7 phone number.

8 They made the decision she should appear in
9 court, in open court to address you. Our position is
10 that they made that decision because they didn't have a
11 choice. The evidence was so strong. They knew that
12 their best chance was to have her get up on the stand,
13 do the best she could, because quite frankly, it wasn't
14 going to go well. And we think that's what happened.

15 So, you saw in the deposition, she pleaded
16 the Fifth, okay. That's her right. But two months ago,
17 with the exact same counsel, she said she was less
18 comfortable then. She's more comfortable now.

19 It's a little huff and tough for us to take
20 into account and believe, frankly. These are the same
21 counsel, same individual. So, keep that in mind as well
22 as you think about this.

23 Third, she's outright admitted to what we
24 are alleging in our complaint. She got on the stand and
25 she said, I accessed his accounts.

1 So, quite frankly, you can probably finish
2 your inquiry right there. When the defendant says they
3 did it, it's usually good indication that they did it.
4 So, we do accept her testimony on that point. So, as
5 far as liability, I think you can take that testimony,
6 and you can be done with the first question as to
7 liability because we think that that is unequivocally
8 sufficient evidence, even if you take nothing else,
9 because that shows that she is liable for her actions.

10 You also saw that, you know, she received
11 that they had authorized access in what, November, 2015,
12 right? But she hadn't been with Mr. Hatley in a
13 relationship for what, 6 months, 7 months, 8 months?

14 You know, you can't go into a movie theater,
15 pay \$12 for a ticket, enjoy your movie and then stay
16 there for the next 30 days, right? You're not longer
17 authorized to be in the space. That's what happened
18 here.

19 This whole suggestion that she had some type
20 of authorization is very difficult to take. She also
21 had motive. We saw in both October and November, she
22 had specific motive.

23 In October, her motive was to help Dr. Watts
24 in his divorce proceeding. In November, it was she was
25 breaching accounts right before the custody case was

1 filed between the parties.

2 So, the timing made perfect sense as to what
3 her motives were, what she was trying to accomplish.

4 All right. So we saw the defendant. Our
5 opinion is she didn't do a very good job on the stand.
6 Obviously you can come up with your own decision on
7 that.

8 What did we see from the plaintiff,
9 Mr. Hatelly? From the very beginning, we have tried to
10 earn your trust. We told you from the very beginning,
11 this is what we're going to show you. We've showed
12 basically all of that. Judge Lee said certain things
13 couldn't come in, and that's his right as the judge in
14 the case. But we've done everything we possibly could
15 to present the evidence that we thought would be
16 relevant. And we talked about quite a bit of the
17 evidence.

18 We had Ms. Ashby. She was here for a short
19 period of time, I admit to that, but she was there. And
20 she testified that Dr. Watts also took the Fifth as to
21 the relationship with Ms. Torrenzano and that goes back
22 to the 2015 period.

23 We also saw quite a bit of testimony from
24 Mr. Hatelly. There's an argument that was made that
25 there were too many IP addresses in the testimony that

1 we presented. We had IP addresses. We had phone
2 records. He testified as to having gone to, you know,
3 geo-location services. We didn't get some of that into
4 evidence.

5 But all of that information was front and
6 center. He testified as to every little thing that he
7 did. And the one thing in particular he did was he
8 talked about his white board, right.

9 So, the white board, and that's in evidence
10 and you'll have an opportunity to look at that. You can
11 see literally minute by minute what is happening. He
12 pieces it altogether. It's quite frankly a pretty
13 impressive piece of work in my opinion. So, that's what
14 we saw from Mr. Hatley.

15 Now, what happened on October 13th? Well,
16 it was in the dead of the night, wasn't it? You know,
17 Ms. Torrenzano, she thought it was okay. Why didn't she
18 just walk right up into her local computer and log right
19 in and do everything she wanted to do? Well, because
20 she and Dr. Watts had decided that they needed to go
21 ahead, call each other up on the phone. You've seen
22 those phone records. They made a specific plan to be on
23 the phone at the same time to access the accounts at the
24 same time. They knew exactly what they were doing and
25 they had to take certain steps to undertake this

1 process, right. She didn't just trip on the sidewalk.
2 You know what I mean?

3 So that's something to keep in mind here.
4 How -- why did, you know, she do these things and what
5 was -- what was going through her mind, right?

6 Well, she had to call up Dr. Watts, make a
7 decision with him, schedule the time, get back on the
8 phone, then you had to make a variety of other actions.
9 And each and every one of those points you could stop,
10 right. She could have not accessed his account after
11 she talked to Dr. Watts. She could have not changed the
12 password on his account as she did, many, many, many
13 opportunities and that doesn't count for the times, for
14 example, the July period where she was going to break
15 into the AT&T account like she did, right. So many
16 steps had to be undertaken and she knew what she was
17 doing in every single instance. So, that was October.

18 What did we see in November? Well, we saw
19 just today that there was the Facebook account records,
20 the security account records, right. He had some of
21 that information from a prior litigation with her name
22 on it. There was some information with his name on it.
23 And, what do we see? The IP addresses matched up
24 perfectly. That same device was in both accounts,
25 right.

1 How does that happen? Well, when the same
2 device are in both accounts, that's what you're going to
3 see happened there.

4 We're going to put something on the board
5 for you right now. And this is procedurally a little
6 bit tricky, so we're going to do that right now. We
7 want to put something on the board and we want to go
8 through it in a little bit of detail.

9 Now, this document that's about to come up
10 on the board is from Winchester Medical Center. This is
11 her employer. The employer keeps records. They know
12 exactly what each individual is doing in their own
13 account.

14 You guys probably know from your own
15 experience when you go into your workplace, you have a
16 particular user name, you log in. And then obviously
17 you employer is making sure you don't go to Facebook or
18 whatever it is you're not supposed to be doing, right?

19 Now, what happened in this particular
20 instance is this is in evidence, okay. So you'll have
21 an opportunity to see this later. But Judge Lee ruled
22 that he was going to admit this document into evidence,
23 but he wasn't going to allow the plaintiff to testify
24 about it. So that's why you're hearing from me now, and
25 that's why this has been handled a little bit

1 differently than what we had done with some of the other
2 documents, okay, just so you understand that.

3 So this very first -- so we're going to --
4 Colleen is going to scroll down to the bottom and we're
5 going to point some parts out to you.

6 Your Honor, procedurally, would it be
7 possible for me to go to the large screen? Would it be
8 possible for me go to the large screen?

9 THE COURT: Yes, if you know how to do it.

10 MR. MENHART: I'm just going to point while
11 she scrolls.

12 THE COURT: Oh, I see what you're asking.
13 You can't mark it from where you are. What are you
14 trying to show? Which -- are you trying to deal with a
15 particular --

16 MR. MENHART: I don't want to get -- I'm
17 trying to point out particular logs in this document.

18 THE COURT: Go ahead. You can walk over
19 here.

20 MR. MENHART: I'm going --

21 THE COURT: What page number is that on of
22 the document so the jury can find it. What?

23 MS. EGAN: 26.

24 THE COURT: 26, okay. Go ahead.

25 MR. MENHART: I'm going to be over here in a

1 very non-threatening manner, I hope.

2 Down here, this first, at the very bottom of
3 this page you can see here --

4 THE COURT: What date is that and time it
5 shows?

6 MR. MENHART: Yes, Your Honor. It's
7 November 2nd. The date and time is November 2nd, 2015,
8 at 20:12:43, okay. And you can see here this is
9 Ms. Torrenzano's log-in at Winchester Medical Center.

10 MR. GREENBERG: Your Honor, I object to
11 that. He can say what it says, and the jury can see for
12 itself, but there's no testimony about who logged in.

13 THE COURT: There's no testimony about what
14 a log-in is?

15 MR. GREENBERG: What her log-in is. There
16 is no testimony about her log-in.

17 THE COURT: I'll give you a chance to argue
18 that. Objection overruled.

19 MR. MENHART: We will represent to you that
20 we believe that the user name N-T-O-R-R-E-N-Z was
21 reasonably referred to when they --

22 THE REPORTER: Can you speak up a little
23 louder?

24 THE COURT: We can't hear you. You know
25 what, this is not going to work.

1 MR. MENHART: Not going to work, all right.

2 THE COURT: Get a copy of the document. You
3 can refer to it and then tell us which item you're
4 referring to. And the jury will be able to take notes.
5 And the defense counsel can't see you.

6 Is that as large as you can blow it up?

7 MS. EGAN: No.

8 THE COURT: Well, why don't you go big on
9 the one he's trying to show and not the whole page.

10 MR. MENHART: Ladies and gentlemen, we
11 appreciate your indulgence. This is a high degree of
12 difficulty, closing argument.

13 So what we're going to do, you should still
14 be able to see on the screen. I'm going to refer to
15 this written document here, okay. And we appreciate
16 that the font is not particularly big, so we've done the
17 best we can here. Okay, we again appreciate your
18 indulgence.

19 So, we're looking there at the very last
20 portion, November 2, 2015, 20:12:43 and there's a log
21 that says Gmail under the user name, NTorrenz. And this
22 user name I'll represent to you right now and you'll see
23 this in evidence. This is the same user name that
24 appears throughout the document, okay. There's no other
25 user name on this document.

1 You can see here there's a log on
2 November 2nd that goes to Gmail. Well, you've also seen
3 from Mr. Hatelly, he has a Gmail account. He believes it
4 was accessed on November 2nd from her workplace. That
5 was his testimony. What do we see here? We see the
6 records for -- from Ms. Torrenzano's employer. So
7 there's the Gmail account, right.

8 We're going to work our way up a little bit.
9 You'll see and we're still in November 2nd, you'll see
10 2015 206. What is that? Again, there's a
11 mail.Google.com URL in there. Okay. We move the next
12 out. There's a Google hangout.

13 Our contention is now she's in the Google
14 account. She's in the Google account. She can do
15 whatever she wants now.

16 We're going to scroll a little further up,
17 and what do we see about the middle of the page,
18 November 2nd, 2015, 2027, what do we see there? We see
19 references to LinkedIn. A little bit further up the
20 page, timestamp, 202727 another reference to Gmail.

21 Again, the next line up, another reference
22 to Gmail, another reference to Gmail, and just keeps
23 going all the way up. So I'm going to go one page
24 back -- excuse me. At the very top of the page, you can
25 see there's that Facebook account. She's accessing his

1 account from her workplace at Facebook. And we've seen
2 testimony and exhibits that have been admitted,
3 demonstrating that she was in the Facebook account as
4 well.

5 On the -- so, I've gone back one page. We
6 should be on page 18 now. And you can see sort of at
7 the bottom of the page, Google, Google, Google all the
8 way up. There's Facebook again in the middle of the
9 page. There's Gmail again in the middle of the page.
10 Google, Google, Google, again, working my way all the
11 way up the page, you're seeing more and more of these
12 instances accessing the account.

13 And I appreciate your indulgence. And on
14 the next page, page 17, you see even more references to
15 the Google plus location, right. Moving back to page
16 16, more Google. Moving back to page 15, there's a
17 Facebook URL, same date, right.

18 November 3rd date, middle of the night.

19 MS. EGAN: May I approach counsel, Your
20 Honor.

21 THE COURT: All right.

22 MR. MENHART: I'm going to give you a quick
23 tip about practicing law. Always have a good associate
24 attorney to help you when you need help.

25 Referring back to page 17, you'll see on

1 November 2nd, 2015, 215135 mail.email.VCCS.EDU, allowed
2 same user name, right.

3 What does that tell us about what we've seen
4 from Mr. Hatelly? It tells us that everything he said is
5 exactly correct. These aren't these records. These are
6 the records of the employer. He didn't have anything to
7 do with creating things. He didn't have anything to do
8 with keeping track of them.

9 So there she is accessing the account, the
10 e-mail account that he testified he retained messages.

11 So those are the things that you guys -- I'm
12 going to spare you going through every single page of
13 this document. Please go through the URL. Get a feel
14 for what's there, what isn't there. See if you see some
15 of these URLs that you would expect to see based on what
16 Mr. Hatelly has told you during his testimony.

17 I think you're going to find if you take the
18 time to do that, that you're going to see a lot of
19 information about what he -- what he said that she did,
20 and you're going to find that it's relatively
21 consistent.

22 All right, we're going to take that off the
23 screen. Okay. Thank you. That's how long I've gone so
24 far. No?

25 THE CLERK: No, this is what you have left.

1 MR. MENHART: Okay, I'll go faster.

2 You've seen all the evidence. Let me state
3 very briefly. Preponderance of the evidence means
4 51 percent. Judge Lee just gave you that instruction,
5 okay.

6 We think this evidence shows a hundred
7 percent. But even if you think it's 99 or 98 percent,
8 we've met that standard. That's the way we feel.

9 So, we are going to ask that you enter a
10 verdict in favor of the plaintiff. Okay.

11 Now, listen up. If you don't hear anything
12 I say the rest of today or anything else that I've said,
13 hear this now. If you don't award damages, she wins the
14 case. Okay. I'm going to say it again. If you don't
15 award damages, she wins the case.

16 Our system relies on money as, you know, the
17 quote unquote, punishment for bad acts. That's the way
18 the system works, right. We can't, you know, we can't
19 smack people with a wet noodle or whatever the case may
20 be. This is the way the system works.

21 If you don't award damages, she wins the
22 case, okay. So make sure you understand that when you
23 go back to the jury room.

24 Now, what type of damages should you award?
25 We -- I'm going to tell you right now -- I'm going to

1 tell you what I ask and I'm going to tell you how we got
2 there, okay.

3 The range should be \$25,000 to \$75,000,
4 okay. Maybe you think that range is way high; maybe you
5 think it's way low. I'll tell you how I got there.
6 There is a case that happened in this courthouse, not in
7 front of Judge Lee but in this courthouse, that involved
8 the jury, that involved a Stored Communications Act
9 case --

10 MR. GREENBERG: Your Honor, he's not going
11 to actually bring in a verdict of another case. That
12 would be inappropriate.

13 THE COURT: Sustained.

14 MR. MENHART: We will tell you that we have
15 done our research, and we believe that the amount that
16 we're asking you for is justified. I'm going to put it
17 to you that way. We believe that the amount that we're
18 asking for is justified.

19 And, we have the right to ask for more than
20 this. Okay. We do. We could ask as much as we wanted,
21 but we are trying to be honest with you. We tried to
22 earn your trust. We're trying to do it now. That range
23 is where we think the damages should come in, okay. You
24 guys have the final decision on that, but that's your
25 decision to make. That's the range that we think you

1 should be in.

2 Now, let me tell you very briefly. Ms.
3 Torrenzano, she's smart. There's no question or doubt
4 about it. Right. Look how sophisticated she was in
5 breaking into the accounts. She knows what she's doing.
6 She's a smart person. She's employed. She's a nurse.

7 If I had to choose one profession where I
8 was absolutely sure I would be employed for the rest of
9 my life, I would choose nursing, right. That's my
10 personal opinion. Take it for what it is.

11 But, these things are not -- you know,
12 Mr. Greenberg is going to come up and tell you she's
13 completely poor, right, I'll let him make his argument,
14 but she has resources, right. She has her family
15 members. They've been very supportive of her in that.
16 They've lent her money. She has resources. She has
17 smarts. She has a job. She has assets and she has the
18 ability to be responsible for her acts. She's not
19 incapable of responsibility for her acts. Keep that in
20 mind as you consider damages.

21 One more thing on this. If you issue
22 damages in a judgment, that is not something that you
23 have to write a check for when you walk out of the
24 courthouse today, right. It takes years --

25 MR. GREENBERG: Is that appropriate? I've

1 never talk about collection aspect of -- this is the
2 second thing. I don't like the impression he's leaving.
3 That's totally inappropriate. Many cases there are zero
4 verdict, and, you know --

5 MR. MENHART: We're going --

6 THE COURT: I prefer not to have speaking
7 objections. I'll give you a chance to argue the case.
8 But I sustain the objection.

9 If you want to tell them what you request,
10 how you calculate it, that's fine. But you can't
11 compare it to other cases. You have to focus on damages
12 that Mr. Hatley asserts and damages of the type that I
13 instructed the jury about.

14 MR. MENHART: We will say this, the range
15 that we just provided broken down by, say, a day, or a
16 week, or a month, is not a lot of money. Let's put it
17 to you that way, okay. So, she has the ability to pay.
18 She should pay. And we will leave it at that for
19 purposes of the damages, okay.

20 Now, I have one more thing I want to say.
21 Attorneys represent a variety of clients, right. I
22 represent Mr. Hatley with a lot of pride. I think he's
23 done the right thing. He's done --

24 MR. GREENBERG: Your Honor, he can't insert
25 his personal opinion in this.

1 THE COURT: Sustained.

2 MR. MENHART: I will thank you all very much
3 for giving me your time and attention today. I want to
4 thank you again for your service. I hope you've enjoyed
5 the experience. And I again ask you to enter a verdict
6 for Mr. Hatley in this matter. Thank you.

7 MR. GREENBERG: Your Honor, may I?

8 THE COURT: Yes, I'm waiting for you.

9 MR. GREENBERG: Thank you.

10 Good afternoon. So, it is my -- I submit to
11 you that Ms. Torrenzano has not violated the Stored
12 Communications Act. I heard that Mr. Menhart just said
13 to you that because of the fact that she made the
14 admission that was the end of it. You should decide
15 liability right then and there and move on to the next
16 phase. And yet he didn't move on.

17 Directly after saying to you it was an
18 open-and-shut case, that the mere fact that she
19 mentioned on the stand, admitted on the stand that she
20 went to his e-mail, he then went on to show you all the
21 exhibits and tell you what you should look at to
22 continue to prove to you what happened.

23 If he was sure that it was a violation of
24 the Stored Communications Act, that really would have
25 ended it. The reason it didn't is because that isn't

1 the only evidence that you need to consider.

2 The statutes said that if somebody looks at
3 your e-mail, that's a violation and they should then --
4 the question is should there be an award, that would be
5 the end of it.

6 It would be like if someone said if you were
7 assault and battered, if somebody hit you in the face,
8 then you can collect damages. If they said, if somebody
9 hit you in the face and you're standing on the VDOT
10 property, you can collect damages, then you must also
11 show that first you were hit in the face and second that
12 you were standing on VDOT property.

13 The evidence that you've not heard here
14 today, what they have failed to introduce is any
15 evidence about the Stored Communications Act.

16 The reasons that you eight people are
17 sitting in a federal courtroom and not in a domestic
18 relations court in Fairfax Count or a juvenile courtroom
19 is because this is an act of Congress.

20 MR. MENHART: Objection.

21 THE COURT: What's your objection?

22 MR. MENHART: You said we weren't trying a
23 divorce case.

24 THE COURT: He just said we were not.
25 Objection overruled.

1 MR. GREENBERG: This is an act of Congress.
2 And what they decided is when you come into a federal
3 courtroom, the question is the Stored Communications
4 Act. What has to be demonstrated is that somebody
5 looked at an e-mail communication while it was in a
6 certain type of storage. That is, at a facility that it
7 was stored for the purposes of backup. You have not
8 heard one single note of evidence to suggest that that
9 exists.

10 You might have your own individual opinion.
11 You might have your own belief even based on your own
12 training and experience. But as you know, you have to
13 base your opinion on the evidence that they put forward
14 today in front of you here in this courtroom.

15 And they have neglected. They do not have
16 the evidence to establish that she looked at a
17 communication while it was stored for backup purposes.

18 Now, what does backup mean? What does
19 backup mean? So, for example, if I receive something
20 and I have a piece of paper and I decide I might -- if
21 something happens to it, I want to make sure I have the
22 ability to go and look at it again, I would submit to
23 you that's a backup copy.

24 If there's a server somewhere, if there's a
25 server, cloud computing, and you decide at the end of

1 every week you're going to take whatever is in your
2 business and then you put it on a little backup storage
3 and you put it somewhere, Congress made a special law
4 about the backup properties and somebody going into the
5 backup facility.

6 But, you don't have that evidence. What you
7 have is a different type of evidence. And that's really
8 a crucial distinction.

9 Now, the essence of the cases you heard kind
10 of boils it down from this idea of a federal case and
11 then as you heard it goes down to two people living
12 together, two 20-year old people living together with
13 two children. They're five years of age. They get into
14 a custody battle.

15 Unfortunately, people don't always act --
16 you don't take their likeness. You don't take their
17 best likeness during the course of a dispute whether
18 it's in a divorce, which I know they weren't married, or
19 in custody, because people don't always act right.

20 I don't suggest to you that it is morally
21 correct for someone to look at someone else's e-mail. I
22 don't say that you should condone that. That's not the
23 question before you whether that's right or wrong.

24 One of the other issues is whether she knew
25 it was unlawful. Now when she was first called to

1 testify in the deposition, the first thing she did she
2 told all. She didn't know there was even a possibility
3 of, as the Judge instructs you, the ambiguity that some
4 people start to take the Fifth because they don't
5 understand their situation any longer.

6 But the Fifth Amendment is not just for when
7 you're wrong, but when you're innocent and you're
8 uncertain of where you are and what you should do.

9 She told you she did not think it was
10 unlawful. I'm sure she didn't think it was right. I'm
11 sure that we will all agree that if we looked at our
12 spouses, our sisters, our brothers, our children's
13 e-mail when we're making sure they're not doing the
14 wrong thing in life -- maybe there's an exception for
15 parents, quite frankly.

16 But if you look at all that, we might not
17 think it was the right thing to do, but we wouldn't know
18 it was unlawful. We don't have one indicia, for
19 example, that indicates Nicole Torrenzano has ever
20 committed a crime or has the kind of character that she
21 would do something knowingly unlawful.

22 So, that's the other aspect of the statute.
23 Knowing. Intentional. Willful. You can't stumble into
24 it. You can't negligently do this and then end up in a
25 federal courtroom where a jury is deciding whether or

1 not basically to change your life.

2 You can't stumble. You can't -- it's not a
3 negative thing. You have to be knowing. It has to be
4 willful. It has to be intentional. And it would have
5 to be willful, knowing and intentional if you went on to
6 a server or some place that had stored communications
7 and you looked at some of that information knowing you
8 was in backup. You have to know that. She didn't know
9 that.

10 And then, to be sanctioned for punitive
11 damages, you have to know that it was unlawful. Because
12 punitive damages are such a significant thing in society
13 that we do to somebody, we want to do it to people that
14 are walking around committing basically a crime. They
15 know what they're doing is wrong and unlawful.

16 She didn't know that. There's no evidence
17 of that.

18 One of the other aspects, too, I would tell
19 you is, I know that Mr. Menhart has indicated that
20 Mr. Hatley, who, I'm sure he's not a bad guy. I don't
21 know why he so litigious. I can't understand why he
22 would want to bring the mother of his children into this
23 courtroom nearly two years later after she read an
24 e-mail.

25 For one -- because, even during the year,

1 where nothing happened, from November until the time
2 that he files the lawsuit sometime in September of 2016,
3 nothing surfaces. In fact, he even told you on the
4 stand he wasn't even certain that she ever read any of
5 the e-mails until she testified about it.

6 It didn't come out in social setting. There
7 was no information that was used to embrace him. There
8 wasn't -- or to harass him or to challenge him. It
9 wasn't given to anybody. Nothing happened with the
10 evidence in any way, shape or form. I don't know what
11 would cause him to want to basically, financially,
12 devastate her, to bring her to a court well over a year
13 later. I don't understand it.

14 Well, I know he lost the custody, but I just
15 can't imagine that would be the impetus.

16 I tell you about -- I tell you about that
17 factor because when the Judge read you the jury
18 instructions about punitive damages, to the degree that
19 it would ever be appropriate and I submit that it
20 wouldn't be. It's not about Mr. Menhart winning. He
21 said that three times. He doesn't win. It's not about
22 a win. It's about what right and fair to do under the
23 law with the facts and the law. That's what the
24 question is here.

25 So, the first question is the

1 reprehensibility if we look at damages, if you went
2 pass, as I submit you shouldn't, that you knowingly did
3 an unlawful act, then the reprehensibility of the
4 defendant's conduct, again, she doesn't show the e-mails
5 to anybody. She doesn't give them to anybody.

6 And, he doesn't even know that she read what
7 she read until yesterday in the courtroom.

8 Then, there's the question of the
9 relationship between the plaintiff and the defendant.
10 Two people, with two children, both of them not making
11 much money. She makes \$58,000 a year, emergency room
12 nurse. I have to imagine she has some capacity for
13 caring for others.

14 And we see a litigation. We see that
15 they're fighting with each other. There's -- you heard
16 the Peyton Place affairs that are going on. Those
17 relationships don't suggest punitive damages.

18 The likelihood that the defendant would
19 repeat the conduct, she hasn't in nearly two years. We
20 know that, we have a track record. We can see that. We
21 don't even have to speculate or guess.

22 The defendant's financial condition. So,
23 she's an emergency room nurse. She makes, I don't know,
24 55, \$59,000 per year. She is well in debt. She has
25 \$500 in the bank. She owes thousands of dollars, quite

1 frankly, for all the litigation that occurred, to her
2 family members. Why? Why?

3 And then the last thing is the relationship
4 of the award of punitive damages, the amount of actual
5 harm suffered by the plaintiff. Zero. In this case,
6 zero.

7 The Judge -- you'll see there's no
8 instruction asking you to locate damages or decide
9 damages. The damages are not here. Punitives are
10 punishment. Damages, he has none. He has none.
11 There's no instruction asking you to find for damages.

12 So, you have -- that's one instruction I ask
13 you to put your attention toward.

14 I ask you to also point out the fact that
15 because someone brings a lawsuit doesn't make them
16 right.

17 I want to go back for a moment about the
18 Stored Communications Act because it's so important that
19 you look to the instructions. You decide if it's clear
20 to you that there's no escapable conclusion. Well, if
21 it's clear to you by the preponderance of the evidence,
22 I submit there's no evidence at all that the elements
23 have been established.

24 I want to comment a little on the evidence,
25 but I'm loath to do it because I don't think the fact

1 that she admits she looked at the e-mails matters what's
2 in there. But it's funny, because some of it seems like
3 magical thinking. She has a Gmail account. She has a
4 Facebook account. You know that.

5 So she looked on some of the last -- the one
6 exhibit that they decided to publish during the closing
7 argument. You'll notice if you look it says Facebook
8 and says blocked. Actually, they don't allow in any
9 hospital setting for the employees to look at Facebook.

10 So she couldn't be on Facebook in that
11 particular way, her own or his or anyone else. And
12 you'll see if you look at the last couple pages of that
13 exhibit, you'll see it was blocked.

14 I tell you that because some of what has
15 been offered, because he's got his own prism on, is just
16 wrong. She goes into her own Gmail account. She goes
17 into her own Facebook account.

18 But I suppose at the end of the day, it
19 seems to me that regardless of what I might submit,
20 there is a little bit of smoke and mirrors. It doesn't
21 matter because she didn't look in the account.

22 So I don't know why they spent so much time
23 on that, given her statement, I don't know why they
24 didn't spend time and explain to you the fact about --
25 that not bringing -- I don't know why they didn't bring

1 evidence into this courtroom before you to show you why
2 they violated the Stored Communications Act. Why they
3 didn't show you why this isn't a mom and pop domestic
4 case of one person looking at someone else's e-mail.
5 That's not enough, because we're in a federal court.
6 And as the Judge admonished us repeatedly through these
7 proceedings, the Judge kept saying stick with the Stored
8 Communications Act.

9 How -- what is the remote server? He didn't
10 say that, but I'm saying. What is the remote server?
11 How she gets on it? Where's the facility with the
12 stored communications? Where is the expert testimony to
13 tell us, to tell you, so you can make this finding what
14 the facility is with the Stored Communications Act, that
15 this particular communication she read was in that
16 setting and stored and that it was for the purposes of
17 backup. Where is that evidence? And the answer is,
18 it's just not here.

19 So, although I tell you about punitive
20 damages, I don't think that it was unlawful so I don't
21 believe you should award punitive damages. I submit to
22 you, ladies and gentlemen, you don't have to get to
23 that. You don't have to get to that because there's no
24 liability under the facts as submitted in this case as
25 it applies to this law. There is no liability.

1 Finally, I'd like to say this. The
2 plaintiff has the burden of proof. That's why they go
3 first when they put on the evidence. That's why they go
4 first in the closing argument. And when I sit down, Mr.
5 Menhart is going to stand up and he's going to say more
6 things to you because they have the burden of going
7 forward always. It's not about who has a better story.

8 Ms. Torrenzano needs to produce no evidence.
9 It's their burden. It's always their burden. If they
10 don't have the evidence, you can feel satisfied it's not
11 about who you like or don't like. You can fold your
12 arms and say we did our job. We can't go forward
13 because you don't have the evidence.

14 And because it's their burden, they get to
15 speak last when I sit down. Because psychologically,
16 there is an idea of primacy and recency. We remember
17 best what we hear first and what we hear last.

18 So I won't have a chance to stand up again
19 and refute what I believe I would disagree with Mr.
20 Menhart. So I'm asking you to consider the arguments
21 that we would raise to Mr. Menhart because he has the
22 last chance to speak.

23 Thank you, ladies and gentlemen.

24 MR. MENHART: The advantage is to go last,
25 but there's also an advantage to them in that this is

1 going to be extremely brief.

2 Counsel just said to you she did not give
3 the e-mails to anyone. Yes, she did it. She gave them
4 to Dr. Watts. It was literally half of the case.

5 Second, zero harm. I'm not going to say
6 anything other than look where we are, look where we're
7 standing, look who's sitting in this room.

8 Finally, not knowing whether it was unlawful
9 or not. You will have to make the factual determination
10 as to whether Ms. Torrenzano indisputably smart,
11 confident, capable did not know what she was doing was
12 wrong or unlawful or whatever you want to call it.

13 Again, we would ask that you please issue a
14 verdict on behalf of Mr. Hatelly.

15 Thank you.

16 THE COURT: Ladies and gentlemen, you've
17 heard all the evidence, heard the instructions of the
18 Court and now the arguments of counsel. It is now your
19 duty to deliberate and arrive at a unanimous verdict.

20 Give us a few moments and we will send back
21 to you the jury instructions in writing along with all
22 the exhibits that have been admitted for your
23 consideration.

24 Given the hour, we're going to stop at 5
25 unless you all decide you want to stay longer. My

1 preference is to stop at 5 and for you to resume
2 tomorrow. And you can decide if you want to come a
3 little earlier tomorrow or just let us know.

4 So we ask you to retire now and return a
5 unanimous verdict and give us a little time to get the
6 things back. All right. Thank you.

7 (Jury excused at 4:39 p.m.)

8 THE COURT: All right, counsel, before I
9 leave the courtroom, I want you to look at all the
10 exhibits to make sure what's been admitted in evidence
11 is what should be presented to the jury. And you need
12 to sign my little form saying that you've reviewed the
13 exhibits and you're sure what's going back is what
14 should go back.

15 We will be back in a few minutes with the
16 instructions for you to look over one final time before
17 they go back to the jury room.

18 We stand in recess until the jury returns a
19 verdict.

20 Thank you.

21 (Court recessed at 4:39 p.m. and reconvened
22 at 5:23 p.m.)

23 THE COURT: You can bring the jury out, Mr.
24 Hendrick.

25 MR. HENDRICK: Yes, sir.

1 THE COURT: You may be seated. Ladies and
2 gentlemen, I apologize for keeping you an additional
3 23 minutes. I have no excuse. And I have no reason, so
4 I ask you to accept my apology.

5 Tomorrow what time would you all like to
6 come back? Is 10 o'clock acceptable or would do you
7 want to come earlier than 10.

8 THE JUROR: We would like to at nine-ish.
9 We don't want to start no later than 9:30.

10 THE COURT: That's fine. When you come back
11 tomorrow, remember not to begin your deliberations until
12 all the jurors are in the room. And if anyone has to
13 step out during your deliberations to use the restroom
14 or something like that, wait until everyone is present
15 so that everyone can participate in the deliberations.

16 Remember as I said to you before, please do
17 not discuss the case. Don't permit the case to be
18 discussed in your presence. Don't do any research on
19 the case and leave your notes in the jury deliberation
20 room.

21 We'll resume tomorrow at nine-ish or 9:30 at
22 the latest. You're free to leave. I'm sorry. Hold on
23 one second.

24 Oh, is there a juror who has to leave
25 tomorrow? Okay. Thank you very much. You're recess

1 today. You can leave. Thank you very much.

2 (Jury excused at 5:25 p.m.)

3 THE COURT: Have you all resolved the
4 exhibits to go back?

5 MR. GREENBERG: We have signed off.

6 THE COURT: All right. Then, if you would
7 like to look over the notebooks before they go back,
8 you're welcome to stay to do that. If not, you can come
9 back tomorrow at 9:30-ish or at least have one person
10 from each side come back so you'll be able to be reached
11 by phone if the jury has a question or the verdict is
12 reach.

13 So if you all would let Mr. Hendrick know.
14 Give us your cellphone numbers where we can reach you.

15 MR. GREENBERG: Is it possible -- initially
16 Mr. Menhart and I had put in a request to, if at all
17 possible, have electronics and then we submitted the
18 certification, the inquiry. Can we also have the right
19 to put our cellphone on it? We can walk around and have
20 the bailiff call us -- the marshal --

21 THE COURT: You would like to have
22 permission to bring cellphones in the building for the
23 lawyers?

24 MR. GREENBERG: Yes.

25 THE COURT: All right. Just give my law

1 clerk your telephone number -- just your names and we'll
2 put that in an order right now and let the court
3 security officer know you can bring your phones in.

4 Do you want to bring an iPad or something
5 like that or laptop in?

6 MR. GREENBERG: Yes, if we were able to use
7 the wifi --

8 THE COURT: You have to bring your own wifi.
9 Do you need to do that? Do you want to do that?

10 MR. GREENBERG: I can use -- I have an iPad.
11 That would be great. That would be helpful.

12 THE COURT: Okay. Well, add that to the
13 list. You all set?

14 MR. MENHART: Your Honor, we just have an
15 order that says 5th and 6th. So, I guess if you could
16 write it up, maybe put our names on it.

17 THE COURT: Yes, we will, phones and iPads
18 and laptops for all three of you.

19 MR. MENHART: Yes.

20 THE COURT: Okay, all right. And you'll
21 give Mr. Hendrick your number so we can find you if the
22 jury has a question or a verdict.

23 MR. MENHART: Yes.

24 MR. GREENBERG: How close do we have to be,
25 5 minutes, 20 minutes, when you call?

1 THE COURT: 20 minutes is about the outer
2 limits, I think, no more than 30. 20 minutes at the
3 outer limits. The jury get anxious if they have to wait
4 that long.

5 MR. GREENBERG: Of course.

6 THE COURT: Thank you very much. We're in
7 recess.

8 (Proceedings concluded at 5:28 p.m.)

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CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the trial in the case of Patrick Hately vs. Nicole Torrenzano.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said trial, and that the foregoing pages, numbered 1 to 223, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 24th day of July, 2017.

/s/

Renecia Wilson, RMR, CRR
Official Court Reporter